85-1259

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD LUNN TULL,
Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
Robert G. Doumar, District Judge. (C/A 8-668-N)

Argued: February 7, 1985 Decided: July 30, 1985

Before WINTER, Chief Judge, SNEEDEN, Circuit Judge, and WARRINER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Richard R. Nageotte (Nageotte, Borinsky & Zelnick on brief) for Appellant; Claire L. McGuire, Department of Justice (F. Henry Habicht II, Assistant Attorney Gen-

eral; Elsie L. Munsell, United States Attorney, John F. Kane, Assistant United States Attorney, Diane L. Donley, Martin W. Matzen, Department of Justice on brief) for Appellee.

WINTER, Chief Judge:

Defendant Tull, a real estate developer, placed fill on "wetlands" without a permit at several locations on the island of Chincoteague, Virginia. The government sued, alleging that this filling violated both the Clean Water Act,[1] 33 U.S.C. § 1251 *et seq.*, and the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* The district court found Tull had violated both Acts, fined him, and ordered various other remedies. Tull appeals, and we affirm.

I.

We begin our discussion by summarizing the statutory and factual background of this dispute. We then treat those of appellant's arguments that merit discussion.

Statutory Background

The Clean Water Act aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this purpose, the Act prohibits the discharge without a permit of dredged or fill material into "navigable waters" of the United States. 33 U.S.C. §§ 1311, 1344. The Act authorizes the Secretary of the Army to issue the permits required for such discharges. The Secretary has in turn delegated this authority to the Corps of Engineers. 33 C.F.R. § 325.8 (1984). The Corps evaluates permit applications under guidelines developed by the Environmental Protection Agency in conjunction with the Secretary of the Army. 33 U.S.C. § 1344(b).

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[1] Also known as the Federal Water Pollution Control Act.

The reach of the Clean Water Act extends beyond discharges into waters actually supporting navigation. "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). During the legislative proceedings culminating in the enactment of that section, the Conference Committee explained the legislative intent in defining this term:

> The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

S. Conf. Rep. No. 1236, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3776, 3822.

Included in the areas subject to Corps regulation under the Clean Water Act are "wetlands" adjacent to other "waters" of the United States. 33 C.F.R. § 323.2(a)(1)-(7) (1984). "Wetlands" are defined as "those areas that are inundated or saturated by surface or ground water at a frequency and duration suffiicent to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted to life in saturated soil conditions." The administrative definition further provides that wetlands "generally include swamps, marshes, bogs and similar areas." 33 C.F.R § 323.2(c) (1984).

The Rivers and Harbors Act, which defendant Tull was also found to have violated, prohibits placing fill in navigable waters without the authorization of the Secretary of the Army. 33 U.S.C. § 403. This Act defined "navigable waters" at the time of Tull's alleged violation as waters that "have been used in the past, are now used, or are susceptible to use" for interstate commerce, and waters subject to the ebb and flow of the tide. 33 C.F.R. § 209.260(k)(2) (1975), superseded by 33 C.F.R. § 329.4 (1984) (similar definition).

Factual Background

The government sued Tull in July of 1981 for dumping fill at three locations in violation of the Clean Water Act:

(1) Ocean Breeze Mobile Homes Sites;

(2) Mire Pond Properties

(3) Eel Creek.

The government later amended its complaint to allege that by placing fill in Fowling Gut Extended, a manmade waterway on the Ocean Breeze property, Tull also violated the Rivers and Harbors Act.

The evidence at a 15-day bench trial showed that Tull began placing fill on the Ocean Breeze property in 1975, on the Mire Pond properties in 1978, and on the Eel Creek property sometime after December of 1980. Tull filled in Fowling Gut Extended, a body of water described as a canal or ditch, beginning in 1976. Tull never applied for a permit to place fill at any of these locations.

Tull did not deny that he had placed fill at the locations alleged, nor did he claim that he had ever applied for a permit. Rather, he argued that the properties filled did not contain wetlands within the meaning of the Clean Water Act, and that Fowling Gut Extended was not navigable within the meaning of the Rivers and Harbors Act. He further argued that the government was estopped from seeking equitable relief, and that the Clean Water Act as applied to him was unconstitutional.

On the issue of whether the filled properties contained wetlands, the government produced at trial extensive evidence, including 12 expert witnesses, to establish that the areas filled by Tull included "wetlands" within the jurisdiction of the Corps of Engineers. Buried soil analysis showed the presence of peat, which develops only in

wetlands system. Vegetation analysis showed the presence of "obligate" wetlands species, which require saturated soil conditions. Expert testimony established tidal influence and some degree of inundation.

Dr. Donna Ware, a court-appointed expert, agreed with the conclusions of the government witnesses, finding wetlands existed on the properties in question. Mr. Ronald Beebe, a civil engineer testifying for Tull, disagreed. His opinion that certain filled areas were not within Corps jurisdiction, however, was based not on the regulatory definition of wetlands, but on the fact that the developed sections lay above the high-water mark. The district court supplemented the extensive expert testimony by conducting a viewing of the filled areas.

The evidence on Fowling Gut Extended showed that the federal government had spent $30,000 in 1963 for construction of a drainage ditch to control mosquito breeding. One witness testified that boats could travel up this ditch or canal, at least for a short time, and that it was subject to the ebb and flow of the tide.

The district court concluded that there was "substantial, credible evidence" that Tull had filled areas "typically tidal, marsh or bog in character" on all the properties in question. It found that Fowling Gut Extended "was navigable in fact and was utilized by boat traffic subsequent to 1963 and prior to the time when [Tull] filled in this waterway without applying for or obtaining any permit from the Army Corps of Engineers." Concluding that Tull had violated both Acts, the district court assessed fines of $75,000 for the filling at Ocean Breeze, Mire Pond, and Eel Creek, and ordered Tull to restore areas on all three properties to wetlands. For filling Fowling Gut Extended, Tull was ordered either to pay a $250,000 fine or to restore the canal "to its former navigable condition."

II.

Whether the Clean Water Act or its Application Here is Unconstitutional.[2]

A. *The Commerce Clause*

Tull argues that the regulation of his property under the Clean Water Act goes beyond the proper reach of the commerce clause. The Seventh Circuit rejected this argument in United States v. Byrd, 609 F.2d 1204, 1210 (7 Cir. 1979). It found that regulating wetlands was justified by the negative effect that destruction of wetlands could have on the "biological, chemical, and physical integrity of the [navigable] lakes they adjoin." *Id.* at 1210. The Supreme Court has cited this discussion in *Byrd* with approval, noting "we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution . . . ." Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 282 (1981). We follow these authorities and reject defendant's argument.

Tull concedes that there is precedent rejecting his commerce clause argument. He urges, however, that the government already litigated this issue against him and lost, in United States v. Tull, No. 75-319-N slip op. (E.D. Va. November 12, 1975). We disagree. Collateral estop-

[2] Tull made a fifth amendment taking argument in the district court. It, however, rejected the argument on ripeness grounds, and Tull has not reasserted this argument on appeal. A Sixth Circuit panel, we recognize, has narrowly construed the Clean Water Act's regulatory definition of wetlands to avoid what it sees as "a very real taking problem." United States v. Riverside Bayview Homes, Inc., 729 F.2d 391, 398 (6 Cir. 1984), *cert. granted*, 105 S. Ct. 1166, 84 L. Ed. 2d 318 (1985). Even *Riverside's* narrow construction, however, encompasses the swamp, marsh or bog adjacent to navigable waters at issue here. 729 F.2d at 398. *Riverside* would exclude only "inland low-lying areas" from Corps jurisdiction. *Id.* at 398, 401.

pel precludes the government from relitigating "the same issue already litigated against the same party in another case involving virtually identical facts." United States v. Stauffer Chemical Co., 104 S. Ct. 575, 578, 78 L. Ed. 388, 392 (1984). The earlier case against Tull, however, did not present a virtually identical situation, nor was the commerce clause issue squarely presented.

In the earlier case, Tull introduced fill without a permit into an area behind a bulkhead. The district court found that the area was "high and dry most of the time," and "would probably see a little flooding for only two or three hours per month." It lay above the mean high water line, and the district court found it "could not even be said to be 'periodically' flooded" within the meaning of the regulation then defining Corps jurisdiction. *See* 40 Fed. Reg. 31,320 (1975).[3] The district court then suggested in dictum that including land which is "high and dry, above the average high tide" line within federal regulation because it might be periodically inundated "is further than we choose to go." That decision left open the question whether areas that receive sufficient flooding or saturation to support plants adapted to "saturated soil conditions," and that therefore meet the current definition of "wetlands," 33 C.F.R. § 323.2(c) (1984), are constitutionally subject to federal jurisdiction.

B. *Vagueness*

Tull argues that the Clean Water Act regulations are unconstitutionally vague because the imprecise definition

[3] This regulation, now superseded, provided:

> Corps jurisdiction would extend to all coastal waters subject to the ebb and flow of the tide shoreward to their mean high water mark . . . and also to all wetlands, mudflats, swamps and similar areas which are continguous or adjacent to coastal waters. This would include wetlands periodically inundated by saline or brackish waters that are characterized by the presence of salt water vegetation capable of growth and reproduction . . . .

of "wetlands" makes it too difficult for landowners to determine their potential liability. We reject this argument, as have other courts. *See* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 917 (5 Cir. 1983); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1187 (D. Ariz. 1975). As applied to this case, the regulatory definition of wetlands is sufficiently definite to give a person of ordinary intelligence fair notice of what conduct the Clean Water Act prohibits or requires. *Cf.* United States v. Harriss, 347 U.S. 612, 617-18 (1954).

III.

Whether Tull Had a Right to a Jury Trial

We find no merit in Tull's claim that he had a right to a jury trial in this case. The seventh amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the amendment was adopted. Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 458 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). ". . . Congress may constitutionally enact a statutory remedy unknown at comomn law, vesting factfinding in an administrative agency or others without the need for a jury trial." Republic Industries v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628, 642 (4 Cir. 1983), *cert. denied*, 104 S. Ct. 3553, 82 L. Ed. 2d 855 (1984).

Tull urges that he had a right to a jury trial because the government was seeking civil penalties under the Clean Water Act. To support this argument, he points to the Second Circuit's decision in United States v. J.B. Williams Co., Inc., 498 F.2d 414 (2 Cir. 1974). The court there found a seventh amendment "right of jury trial when the United States sues . . . to collect a [statutory] penalty, even though the statute is silent on the right of jury trial." *Id.* at 422-23 (quoting 5 Moore, Fed-

eral Practice ¶ 38.-31[1] at 232-33 (1971 ed.)). In so holding, the Second Circuit found guidance in several older Supreme Court cases. Thus in Hepner v. United States, 213 U.S. 103, 115 (1909), the Supreme Court suggested in dictum that "[t]he defendant was, of course, entitled to have a jury summoned" where the government sued to collect a $1,000 civil penalty for violation of the Alien Immigration Act. *See also* United States v. Regan, 232 U.S. 37 (1914) (dictum regarding penalty under Alien Immigration Act).

We reject defendant's argument. First, we note that the Supreme Court has left open the question whether the dictum of *Hepner* and *Regan* "correctly divines the intent of the Seventh Amendment," or whether the seventh amendment has no application to government litigation at all. *Atlas Roofing*, 430 U.S. at 449 n.6.

Second, even assuming that the seventh amendment applies to government litigation, the fact that the government is suing to collect statutory penalties does not require a jury trial. The Supreme Court has not gone "so far as to say that any award of monetary relief must necessarily be legal [as opposed to equitable] relief" for purposes of determining the right to a jury trial. Curtis v. Loether, 415 U.S. 189, 196 (1974). In *Regan* (as in *Hepner*), the monetary relief sought was a penalty of a set amount, and the Supreme Court analogized the suit to "a civil action of debt." *Regan*, 232 U.S. at 47. Here the penalties are within the district court's discretion; the government is not suing to collect a penalty analogous to a remedy at law, but is asking the district court to exercise statutorily conferred equitable power in determining the amount of the fine.

Nor are the penalties simply equivalent to punitive damages in actions at law. Here the assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of

remedies, one part of the package affecting assessment of the others.[4] This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence. In such circumstances, the seventh amendment is inapplicable. *See Jones & Laughlin*, 301 U.S. at 48-49, *quoted in Atlas Roofing*, 430 U.S. at 453 (seventh amendment inapplicable where "recovery of money damages is an incident to [nonlegal] relief even though damages might have been recovered in an action at law," since equity courts historically granted such monetary relief).

IV.

Whether the Government is Equitably Estopped from Suing Tull

Tull argues that the government is equitably estopped from obtaining relief because Corps personnel misled him into believing that his filling activities were lawful and did not require a permit. The district court emphatically rejected this argument, finding that nothing the government did or failed to do misled the defendant. We cannot say this finding was clearly erroneous, and with no showing that the government misled Tull the equitable estoppel argument certainly must fail. *See* Heckler v. Community Health Services of Crawford County, Inc., 104 S. Ct. 2218, 2223-24, 81 L. Ed. 2d 42, 51-52 (1984) (invoking equitable estoppel against government requires at least a showing that party reasonably relied on government's misleading conduct). We therefore need not reach the issue whether misleading by silence or inaction, the most Tull alleges here, could ever justify invoking the equitable estoppel doctrine against the government. *Cf. id.*, 104 S. Ct. at 2224, 81 L. Ed. 2d at 52 (whether

[4] Thus the fine for filling Fowling Gut Extended was offered as an alternative to the injunctive remedy of restoring that waterbody to its previous condition.

doctrine applicable to government at all an open question); United States v. Harvey, 661 F.2d 767, 773-74 (9 Cir. 1981), *cert. denied*, 459 U.S. 833 (1982) (invocation of doctrine against government requires affirmative misconduct).

Tull complains in particular about a Corps of Engineers' visit to the Ocean Breeze property in July of 1976. An engineer told him not to place fill in one part of his property; Tull claims this instruction led him to believe that filling without a permit anywhere else on his property would be proper. Yet several witnesses testified that the purpose of the Corps' visit was to determine whether *ongoing* work required filling permits. At the time of the visit, Tull did not discuss the future development of the property at issue here with the Corps engineers; indeed, he did not yet even have a development plan. Thus, there did not even exist plans that the engineers could have tacitly endorsed. Further, Tull's earlier disputes with the Corps over the filling of property meant he could not have been ignorant of the general requirement of obtaining a permit to fill wetlands.

Tull further complains that the government misled him by waiting several years before bringing this suit. The district court found that any such delay did not mislead Tull. The government sued Tull unsuccessfully in 1975, issued a cease and desist order against his filling Eel Creek in 1976, and also obtained an injunction against his filling at Mire Pond. Given such circumstances, we cannot overturn the district court's finding that Tull was in no way misled by the government's failure to bring even more lawsuits against him.[5]

[5] The dissent, in asserting that the government should be estopped, adopts Tull's argument that he followed the Corps' 1976 directions in placing fill on his property, while the Corps stood by and watched in silence until the government brought suit in 1981. The record establishes, however, that aerial photographs of new filling on Tull's property in the summer of 1978 revealed possible statutory

V.

Navigability of Fowling Gut Extended

Tull argues that he did not violate the Rivers and Harbors Act by placing fill in Fowling Gut Extended, since no credible evidence supported the district court's finding that the waterway was navigable. We disagree. The district court had before it the testimony of an oyster inspector who testified that Fowling Gut Extended was subject to the ebb and flow of the tide. The Corps' regulations in effect at the time Tull filled the waterway defined navigable waters to include those "subject to tidal action." 33 C.F.R. § 209.260(k)(2) (1975), superseded by 33 C.F.R. § 329.4 (1984) (includes waters "subject to the ebb and flow of the tide"). *See also* 33 C.F.R. § 320.8(a) (1984) ("canal or other artificial waterbody that is subject to the ebb and flow of the tide is also a navigable water of the United States"). The district court therefore did not err in finding Fowling Gut extended navigable.

We do not think that Tull's other contentions merit discussion.

AFFIRMED.

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violations. Corps personnel then asked for an on-site meeting "to determine if the shoreline work being done on Mr. Tull's property just south of Beebe Road could be in our regulatory jurisdiction." Tull's lawyer responded by letter that "no work is being done on the property owned by [Tull] adjoining Fowling Gut at Chincoteague Island," and that the Corps' request for an on-site meeting was therefore denied. A Corps scientist testified that at that time the Corps had information indicating that Tull had violated the law with respect to Ocean Breeze, but that it took no action because it lacked sufficient specific data on which to base a cease and desist order. Its effort to get further information by examining the property was thwarted. Given this evidence, Tull cannot argue meritoriously that he was the victim of innocent reliance, or that following the 1976 visit he had no further word from the Corps that they had any question about the propriety of his activities.

JUDGE WARRINER, dissenting:

Having had unhappy experiences with the United States Corps of Engineers respecting alleged encroachment by him on wetlands and navigable waters, appellant Tull hired a lawyer and a civil engineer to review proposed filling of lowlands owned by Tull near Chincoteague. With assurance from the lawyer and the engineer that his proposals would not cause damage to wetlands or navigable waters, he then called in representatives of the Corps of Engineers and took them on a tour of the sites explaining the nature of the work he proposed. During the tour he was advised by an appropriate official of the Corps that a certain proposal could not be accomplished without damage to wetlands. This oral directive was confirmed by letter within a few days. Tull strictly adhered to this direction and to another minor direction given by an official of the Corps on the scene. He proceeded with his other plans in accordance with the advice given him by his lawyer and his civil engineer.

During the next five years while the work was in progress the Corps of Engineers kept the site under surveillance both on the ground and by aerial observation and photographs. They observed over many months plaintiff engaging in the fill activity which he had pointed out to them on the ground on the day of their visit. After plaintiff had completed his work, with no further word from the Corps of Enginers that they had any question about the propriety of his activities, and after plaintiff had sold off lots in the filled area to third parties, the Corps of Engineers in the name of the United States filed this action against Tull seeking injunctive relief and civil penalties for conducting his activities without a permit.

Tull, not the Corps, was fined $75,000. Additionally, extensive and extremely expensive site restoration was required of him. Tull appeals urging that he was mis-

treated by the Corps of Engineers. He points to the equitable doctrine of estoppel.

The Supreme Court has consistently left open the possibility of estoppel against the government. Though the Supreme Court found in *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961), that inaccurate but "well-meant" advice given by a consular officer fell "far short of misconduct such as might prevent the United States" from carrying forward with legal action, the door to estoppel was left ajar.

The Court found that the sort of "affirmative misconduct" adverted to but not found in *Montana, supra*, also was not present in *INS v. Hibi*, 414 U.S. 5, 8 (1973). In that case the alleged misconduct of the government was in not aggressively publicizing immigration rights created by Act of Congress and in not stationing an authorized naturalization official in the Philippines during the statutory period following World War II. Still, the legal possibility of estoppel against the government was recognized. *Id.*

A government agent who failed to respond accurately to a citizen's verbal question in a fifteen minute interview was found to have not acted with sufficient "affirmative misconduct" to estop the government. The instructions he failed to comply with were contained in a claims manual, a volume containing help and guidance but not carrying the weight of law. *Schweiker v. Hansen*, 450 U.S. 785 (1981). Yet the possibility of a government agent conducting the government's business in a sufficiently prejudicial manner as to estop the government from future legal action was again left open. *Id.* at 780.

Heckler v Community Health Services of Crawford City, Inc., 104 S. Ct. 2218 (1984), involved a provider of health care that had relied on policy determinations made by a fiscal intermediary. The health care provider, experienced with government financial programs, knew or

should have known to verify with the applicable governmental department the information received. Thus the inaccuracy of the information given did not estop the government in legal action. *Id.* at 2223.

All of these denials of estoppel left open its possibility. The case at bar can be distinguished from each on its facts. *Schweiker* and *Montana* were both cases of brief, one-time encounters with officials who gave cryptic, verbal advice. By contrast, Mr. Tull, after extensive research by his own agents, initiated a tour and inspection of his property with the specific intent of gaining a ruling from a team of officials from the Corps of Engineers who possessed the requisite knowledge. The Corps continued to monitor the construction site for the next five years.

Mr. Tull is not in the position of Mr. Hibi. He did not ask the government to expend strenuous efforts to inform him of the law. Tull hired a lawyer and an engineer and went to the trouble of arranging an inspection to confirm his understanding of the law; and then complied with it as presented to him. He did not ask his questions of an intermediary as did Community Health Services of Crawford City, Inc. He went straight to the proper governmental authority in his area.

The Supreme Court has stated that for estoppel to lie against the government the private party must at least show "the traditional elements of an estoppel." *Heckler*, 104 S. Ct. at 2224. It explicitly included reasonable reliance. *Id.* at 2223.

Summarizing the traditional notion of equitable estoppel the Ninth Circuit identified four essential elements. They are "(1) The party to be estopped must know the facts; (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) The latter must be ignorant of the true facts (sic.); and (4) He

must rely on the former's conduct to his injury." *California State Board of Equalization v. Coast Radio Products*, 228 F.2d 520, 525.[1] Modifying element (4) to read "he must *reasonably* rely on the former's conduct to his injury" yields a test well within the Supreme Court's standard. *Heckler*, 104 S. Ct. at 2223, 2224.

The case at bar fits all the elements of equitable estoppel. Respecting element one, the Corps certainly knew the facts. Its agents were invited to Mr. Tull's property as work commenced, toured the property, and received a description of the intended work. Though firm drawings were not available for review, the object of the inspection as presented by Mr. Tull was to reach an understanding of the limits of the Corps' interest in the property. Certainly the actions of the inspection party in touring all the properties and not just one site reinforces this. It is undisputed that Tull did no more than he said he planned to do and that the work found by the Corps to be violative of the law was the planned work—obvious to the Corps over the course of five years' surveillance. It had to have been obvious to the Corps many times between July 1976 when the inspection was conducted and July 1981 when the complaint was filed that Mr. Tull was engaged in the work he had explained to the Corps officials. The Corps' agents conducted follow-up inspections, wrote internal memos, and recorded work progress with aerial photography. All attests to their knowledge.

As to element two, if Mr. Tull didn't have the right to believe and rely upon the Corps officials then there simply can't be a case where element two is met. He did what could reasonably be expected to make it clear that he intended to build pursuant to his own experts' opinions unless the Corps raised some objection. The Corps did not object to the purpose of the requested inspection.

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[1] *See also United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 fn. 4 (1970) and 28 Am. Jur.2d, *Estoppel and Waiver*, § 27 (1966).

Significantly, wholly consonant with Mr. Tull's stated expectations and consistent with his purpose, Corps officials forbade certain construction work. Mr. Tull fully complied with the Corps' instructions. The Corps should not be permitted to pretend that it didn't know what was intended by Mr. Tull and by the Corps officials when the inspection was requested and conducted.

The "true fact" of which Mr. Tull was ignorant was that the measures he had taken to ascertain the Corps' interest in his property were inadequate. He believed he had achieved an understanding with the appropriate officials of the Corps of Engineers. He was ignorant of, and reasonably so, the "true facts" as purported five years later by the Corps that he had only obtained a ruling on one particular piece of the whole work.

Finally, I differ with the majority and find clear error in the trial court's ruling that no action or inaction by the Corps misled Mr. Tull. I would find that he did reasonably rely on the combination of actions and inactions by the Corps. Indeed, until I read the holding in this case I would have held it would be unreasonable for Mr. Tull *not* to rely on the United States Army Corps of Engineers. Both I, and Mr. Tull, know better now. As evidenced by the outcome of the trial he certainly relied to his injury.

Were this a case between two private parties the inquiry into estoppel could end here. I think Tull would win hands down. However, as reviewed earlier, estoppel against the government is justifiably eyed warily. Justice Rehnquist wrote a concurring opinion in *Heckler*, 104 S. Ct. at 2228, to refute any "impression of hospitality towards claims of estoppel against the government" that the majority's opinion might have left. He concluded that "our cases have left open the possibility of estoppel against the government only in a rather narrow possible range of circumstances." *Id.*

I believe the circumstances of this case lie within that narrow range. The actions and nonactions of the government agents involved were so far removed from effectively carrying out their duty as to show active efforts to mislead Mr. Tull to his detriment. They were "out to get him." The record supports a suspicion of intentional malice. In possession of all the facts the Corps waited until after lots were sold, when the most harm could be done, to file suit. With full authority to do so, the Corps refused to issue a cease and desist order as their controlling regulation, carrying the weight of law, required. Fed. Reg. Vol. 40, No. 144, 25 July 1975, p. 31330, Addendum "C." The guardians of the nation's wetlands eschewed diligence for trickery.

Although typically inaction on the part of the government would not justify reliance, or bring about estoppel, the inaction consequent upon the inspection tour, the research done by Mr. Tull's agents, and the surveillance, permit Mr. Tull reasonably to conclude approval. Hence, I am not proposing to "punish" the Corps for mis-, mal- or nonfeasance by allowing Mr. Tull to break the law. Rather, I urge the application of estoppel on behalf of a citizen who made a reasonable and good faith effort to discover the law and how it applied to him and has been severely damaged by reasonably relying on the combination of actions and nonactions of government officials, the latter in gross neglect of duty.

The Ninth Circuit found in *Sun Il Yoo v. Immigration and Naturalization Service*, 534 F.2d 1325 (1975), "affirmative misconduct" on the part of the government sufficient to estop it in relation to an alien who had acted in good faith. The Court found no acceptable reason for a delay of ten months in processing information provided by the alien. The delay made Mr. Yoo ineligible for a visa because of a change in the law that occurred while the INS procrastinated unjustifiably on his application. Mr. Yoo was fully eligible under the law as it stood

when he applied. The Ninth Circuit found that "[b]y its maneuvers . . ., the INS [had] ensnared petitioner in a 'Catch 22' predicament; the Service's conduct is analogous to the entrapment of a criminal defendant and, as such, cannot be countenanced." *Id.* at 1328-29.[2]

Mr. Tull's case is even more easily a source of offended decency than Mr. Yoo's. The actions of the Army Corps of Engineers gives the appearance of lying in wait with a calculating eye for five years after first lulling him into a reasonable view that his activities were acceptable; and after he invested time, money, and effort in completing what he thought to be suitable residential lots, the Corps with a bulging portfolio of evidence descended on him. For the foregoing reasons I would apply estoppel and reverse the trial court's decision.

Turning now to the question of defendant's right to a jury trial, I disagree with the majority and find error in the trial court's denial of Mr. Tull's demand for trial by jury.

33 U.S.C. § 1319(b) authorizes the government to bring civil actions in a federal district court to obtain appropriate relief, including typical equity relief, for any violation of specified sections of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* In addition, Section 1319(d) provides for the imposition of a fine under the denomination of a civil penalty. Under subsection (d) the trial court imposed a $75,000 civil penalty without the benefit of a jury's judgment and with this I disagree.

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[2] An Arizona district court applied the "affirmative misconduct" interpretation of *Sun Il Yoo* to a case in which a lawyer was hired by the government, a hiring freeze was put into effect, the lawyer was informed upon inquiry the freeze would not affect his position, the lawyer closed out his private practice in reliance on the assurance and was then denied the job. The district court applied estopel against the government. *Beacom v. Equal Employment Opportunity Commission*, 500 F. Supp. 428 (1980).

The Supreme Court held in *Curtis v. Loether*, 415 U.S. 189 (1974), that the collection of $250 in punitive damages pursuant to a statutory right created by § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, was an action at law that implicated Seventh Amendment rights to trial by jury. The Court specifically rejected the argument that the Seventh Amendment was not applicable to new causes of action created by congressional enactment and reiterated its ruling that the Seventh Amendment applies to causes of action based on statutes. *Id.* at 193, *citing Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962). "Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies." *Id.* at 194. Legal rights are those recognizable at law as opposed to equitable rights which are recognizable only at equity. Ballentine's Law Dictionary 720 and 411 (3d Ed. 1969).

Explaining the meaning of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the *Curtis* court declared that *Jones v. Laughlin* gave no help to a party attempting to block a jury trial when statutory rights are at issue. "*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative procedings, when jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in a statutory scheme." *Curtis* at 195. The Court then discusses similar reasons for rejecting Seventh Amendment rights in bankruptcy proceedings and continues "but when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Id.*

Continuing, the Supreme Court found punitive damages sued for under § 812 of the Civil Rights Act of 1968 to be "legal rights." "Damage action under the statute sounds basically in tort—the statutory remedy defines a new legal duty. . . ." *Id.* ". . . this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is a traditional form of relief offered in the courts of law." *Id.* at 195-6.

As noted, and relied on, by the majority, the Court then states that all monetary relief is not legal relief. But the Court continued by "sharply" contrasting an equitable award of backpay in a Title VII case "with § 812's simple authorization of actual and punitive damages." *Id.* at 197. Further analyzing damages arising from statutory rights the Court reasoned, "nor is there any sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." *Id.*

I place no stock in the difference in nomenclature between the "civil penalty" of the present case and the "punitive damages" in *Curtis*. Both arise from a right created by statute. Both deprive defendant of money by action of court as a result of a breach of the civil law. Both are remedies typically found at a court of law. Neither can be "viewed as requiring a defendant to disgorge funds wrongfully withheld." In neither case is there a functional justification to deny a jury trial. The majority simply accepted the phrase from *Curtis* out of context, as the government invited us to do in its brief, and decided the jury question wrongly.

It should be noted that both *Hepner v. United States*, 213 U.S. 103 (1909), and its follow-up, *United States v.*

Regan, 232 U.S. 37 (1914), which the majority unsuccessfully seeks to distinguish, were decisions settling a debate over whether penalties in the form of so-called civil fines transformed a civil case into a criminal one. The answer was no. Neither case purports to comment on the issue at hand; whether civil penalties may be imposed under the pseudonym of "equitable relief." Both these cases were tried before juries. The *Hepner* court, presupposing a jury, was concerned with making it clear that a judge could direct a verdict if it came out at trial that there were no facts in dispute. Explicitly restricting its decision to civil cases with undisputed testimony, the court said, "the defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict according to the law if the evidence is uncontradicted and raises only a question of law." *Hepner*, 213 U.S. at 115.

The majority observes that there was a statutory limit ($1,000) on the fine imposable in *Hepner* and *Regan* and that the fine imposable against Mr. Tull was unlimited. This, the majority argues, supports a view that the defendants in *Hepner* and *Regan* were entitled to a jury while Mr. Tull was not. One would think just the opposite would be the more persuasive argument. Surely if the Seventh Amendment protects one from a civil fine of $1,000, it should be construed to protect one from a civil fine of $75,000 or an unlimited fine. Cf. 42 U.S.C. § 1995; *United States v. Martinez*, 686 F.2d 334 (5th Cir. 1982); *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974).

Regan and *Hepner*, then, support Mr. Tull's right to trial by jury. Language in these opinions which may appear to the contrary deals only with situations where there is no genuine dispute as to a material fact.

A trial judge's unlimited discretion in meting out fines and imprisonment to contemnors of his court has long been recognized as an essential element of his authority to maintain the order, respect, and dignity of the court. Indeed, the ability to punish for contempt is deemed essential to the maintenance of our courts as functioning tribunals.

Precedent held that the authority to punish for contempt was so essential to the maintenance of our judicial system, the bedrock of the rule of law, that trial by jury could not be permitted to interfere with the determination of punishment by the judge. *Bloom v. Illinois*, 391 U.S. 194, 208 (1968). Upon reviewing the need for unfettered judicial power to maintain the dignity of the court against the contempt defendant's right to a jury, the Supreme Court in *Bloom* [3] opted for trial by jury. This upsetting of precedent and the recognition of the right to a jury trial despite the serious, even fundamental, considerations to the contrary, shows the strength of our Constitution's [4] demand that the right to trial by jury be not infringed.

If in contempt proceedings the weighty considerations counseling against jury intervention are set at naught

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[3] "[I]n our judgment, when serious punishment for contempt is contemplated, rejecting a demand for jury trial cannot be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court." "We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial." "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."

Bloom, 391 U.S. at 208, 209.

[4] If the instant action be considered civil, the Seventh Amendment requires a jury. If, despite, *Hepner*, *supra*, the imposition of a "civil penalty" of $75,000 be considered criminal, the Sixth Amendment requires a jury.

against the right to a jury trial, how much more is the strength of the right when weighed against statutory protection of wetlands. Wetlands are ecologically essential. The dignity of the courts is essential to our very freedom. Surely, if trial by jury is constitutionally demanded despite the need to maintain our court system, it is also demanded despite the need to maintain our wetlands.

The majority infers that the right to jury trial is limited by a party's ability to fit his cause into a relatively constrictive box. The majority says, "the Seventh Amendmant right to a jury trial is limited to suits in the nature of an action existing at common law when the amendment was adopted." Majority Opinion at 9-10. While the statement is true as far as it goes, the Supreme Court has found cause to ever expand what might be included in "the nature of an action existing at common law when the amendment was adopted." In fact the Supreme Court has stated that "in the federal courts equity has acted only when legal remedies were inadequate, the expansion of legal remedies provided by [an act of Congress] and the Federal Rules [of Civil Procedure] necessarily affects the scope of equity." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959).

It is the equity judge's discretion whose borders are limited by the right to a jury trial, and not the reverse as the majority would have it. *See generally Wright & Miller, Federal Practice & Procedure, Federal Rules of Civil Procedure*, Vol. 9, § 2302 (1971). ["If a new cause of action is created by Congress, and nothing is said about the mode of trial, the courts must look to the nearest historical analogy to decide whether there is a right to a jury." "[A] series of [Supreme Court] cases decided since 1959 . . . recognize that there is a strong federal policy favoring trial by jury of issues of fact. This policy by itself may provide the answer in cases in which the historical test gives no clear guidance." "At

a minimum the *Beacon Theatres* and *Dairy Queen* cases lend impetus toward finding a right to trial by jury in doubtful cases. It is highly probable that they do much more than this." "In its decisions since 1962 the Court has shown no inclination to retreat from this judgment that jury trial is now more widely available than it had been in the past."] [footnotes omitted.]

33 U.S.C. § 1319(b) provides for all usual equitable remedies to be available to the government because there is no good substitute for telling a polluter to cease and restore, and to do so immediately. The civil penalty of subsection (d) is another matter entirely. There simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of the citizenry of this nation. Most of us just aren't rich enough to pay a $75,000 fine with out flinching. Before having such punishment inflicted our Constitution and our heritage demands that the facts be presented to a jury of our peers.

Since the remedies sought by the government were both legal and equitable, and the district court may hear both at one time, Fed. R. Civ. P. 1, 2, 18, and the findings of fact necessary to determine what civil penalties, if any, would be adjudged are the same as those to be decided for the equitable remedies sought, the case should have been heard before a jury upon the defendant's demand. *Beacon Theatres, Inc.*, 359 U.S. at 506-510. Therefore, on the issue of jury trial alone, the case should be reversed and remanded for a new trial. On the issue of equitable estoppel the case should be reversed and dismissed.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD LUNN TULL,
Appellant.

[Filed Oct. 30, 1985]

Appeal from the United States District Court
For the Eastern District of Virginia, at Norfolk,
Robert G. Doumar, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Ervin, Chapman and Judge Warriner, United States District Judge, sitting by designation voted to rehear the case in banc; and Judges Hall, Phillips, Murnaghan, Sprouse, Sneeden and Chief Judge Winter voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Sneeden. Judge Warriner dissents.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1766

UNITED STATES OF AMERICA,
Appellee,

versus

EDWARD LUNN TULL,
Appellant.

[Filed Nov. 4, 1985]

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Robert G. Doumar, District Judge

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Warriner, United States District Judge, sitting by designation, voted to rehear the case. Chief Judge Winter and Judge Sneeden voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Russell, Widener, Ervin and Chapman voted to rehear the case in banc; Chief Judge Winter and Judges Hall, Phillips, Murnaghan, Sprouse and Sneeden voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 81-688-N

UNITED STATES OF AMERICA

v.

EDWARD LUNN TULL.

OPINION AND ORDER

This matter came on for a trial by the Court sitting without a jury.

The government filed its original complaint on July 1, 1981. On April 2, 1982, the government amended its complaint. During the course of the trial, the government sought leave to amend its complaint again. Leave was granted, and on October 5, 1982, the government's second amended complaint was filed.

In claim (1) of the second amended complaint, the government charged that between July 1975 and the present, the defendant, without benefit of a permit issued by the United States Army Corps of Engineers, discharged pollutants, namely fill material, into wetlands adjacent to navigable waterways known as Fowling Gut and Black Point Drain. These alleged wetlands were located on properties collectively referred to as Ocean Breeze Subdivisions and specifically referred to as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home

Sites Section B and then Section C. (Section C is shown on the plat of Section B and the three Sections are shown on Exhibits 55A and 55B).

Similar allegations were set forth by the government in claim (2) of its most recent amended complaint. Claim (2) states that sometime between September 28, 1977 and November 14, 1980, the defendant, again without benefit of a permit, discharged fill material into wetlands located on the Mire Pond Camper Sites I and II. The wetlands referred to in claim (2) were likewise alleged to be adjacent to Fowling Gut.

In claim (3) of the amended complaint, the government alleges that the defendant discharged pollutants into wetlands adjacent to Eel Crek, another navigable waterway for the island of Chincoteague. Once again, it is alleged that the defendant failed to apply for a permit prior to placing fill material on the described wetlands.

The government asserts that in filling of the wetlands without a permit the defendant has violated the requirements of the Clean Water Act. 33 U.S.C. §§ 1311, 1344 and 1362(7). Relief is sought pursuant to 33 U.S.C. § 1319.

In its second amended complaint, the government further charges that the defendant filled a navigable waterway of the United States, namely an extension of Fowling Gut, which at one time traversed through Ocean Breeze Mobile Home Sites. The government claims that this extension of Fowling Gut was filled, blocked and closed by the defendant without the authorization of the Secretary of the Army and recommendation of the Chief of Engineers. Relief is sought pursuant to 33 U.S.C. §§ 406; 1319.

The defendant has denied liability on all counts. Additionally, the defendant has raised several affirmative defenses which will be hereinafter discussed in detail.

A lengthy trial before the Court thus ensued. Based upon the factual findings and legal conclusions embodied within this opinion, judgment will be entered for the United States of America.

I.

A long time inhabitant of Chincoteague, defendant Tull is actively engaged in the business of filling and developing residential resort properties on the island. In this action, the Court shall only concern itself with Mr. Tull's alleged activities on the properties commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, (all of which comprise the Green Breeze Subdivision), Mire Pond I, Mire Pond II (both of which comprise Mire Pond), Eel Creek (not yet subdivided into lots) and a body of water hereinafter sometimes referred to as "Fowling Gut extended".[1] A brief general description of these properties will provide the backdrop for the analysis of Mr. Tull's alleged activities thereon.

The Ocean Breeze Mobile Home Sites are located on the Southwestern portion of Chincoteague Island, Virginia. They lie southeast of Chincoteague Channel and northwest of Black Point Drain and Assateague Channel. (See Exhibit 10). Portions of Ocean Breeze Mobile Home Sites abut Fowling Gut and lie atop what is Fowling Gut Extended, a winding navigable waterway which feeds into Chincoteague Channel to the west and into Andrews Landing Gut to the south. On Exhibit 10 Ocean Breeze Mobile Home Sites is circled and lies approximately at the letter "g" of the word "Fowling" and proceeds northeasterly atop said waterway approximately 1000 feet.

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[1] This has been referred to as a "canal" or waterway but is distinguished from "The Canal" shown in Exhibit 10 which is the main channel from Chincoteague Channel to Assateague Channel (See Exhibit 10).

An extension of Ridge Road, Virginia State Route 2102, traverses Ocean Breeze Mobile Home Sites in a southwesterly direction. Initially Ridge Road only extended into the property immediately adjacent to and east of what is now the subdivision of Ocean Breeze Mobile Home Sites and was the only public road which served the subdivision. A service road built and maintained by the defendant Tull, now bounds the Ocean Breeze subdivision to the south, and is referred to on one plat as "Bunker Hill Campground Road"[2], which road was filled in by Mr. Tull. As is shown on a registered survey plat (Ex. 55A) prepared by Mr. Ralph Beebee, the following lots are situated and have been developed to the northwest of Ridge Road and to the south of what is left of a portion of Fowling Gut (and a 50 foot wide reserved right of way which runs through the top or northeastern portion of the subdivision): Lots 23-70, 120-121; Drain Field Lots 23-38, 39-54, 54-70; and several lots denominated as Future Drain Field Lots. To the southeast of Ridge Road the following Ocean Breeze Mobile Home Sites lots are shown on the survey plat: Lots 1-22, 71-119 and six lots denominated as Future Drainfield sites.

Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B (Ex. 55B) are separated by a lane approximately 22 feet wide which is designated on the defendant's subdivision plats as "Drainage Easement." In actuality, a very narrow ditch approximately two feet wide is located within this area. The following lots comprise Ocean Breeze Mobile Home Sites Section B: Lots 1B-78B, inclusive. Ocean Breeze Mobile Home Sites Section C borders Ocean Breeze Mobile Home Sites Section B to the northeast. At present Ocean Breeze Mobile Home Sites Section C is composed of four 50 foot by 100 foot lots; 8C, 9C, 10C and 11C and one 80 foot by 100

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[2] Bunker Hill Campground is another development of Mr. Tull not at issue in this lawsuit.

foot by 100 foot lot; 7C is shown on the same plat as Ocean Breeze Section B.

Sea Shore Drive bounds those numbered lots developed on Ocean Breeze Mobile Home Sites Section B to the southeast. Between Sea Shore Drive and Bunker Hill Campground Road lie three unnumbered lots which are designated as drainfield lots. To the west of the subdivision of Ocean Breeze Mobile Home Sites B was an undeveloped area which, at the time of the Court's September 1982 view of the property, gave the appearance of a swamp or a bog.

With the exception of a few drainfield lots, the majority of lots in Ocean Breeze Mobile Home Sites measure 50 feet by 100 feet. In Ocean Breeze Mobile Home Sites Section B, most lots likewise measure 50 feet by 100 feet. Some of the lots adjoining Sea Shore Drive in Ocean Breeze Mobile Home Sites are irregular in shape and are slightly larger than the standard 50 foot by 100 foot lot dimensions.

Ingress and egress within the Ocean Breeze Subdivisions are provided through Sea Breeze Drive, Sea Gull Drive, Sea Shell Drive, Sea Spray Drive and Sea Horse Drive, roadways which run in a northwesterly direction and generally perpendicular thereto are Ridge Road Extended and Sea Shore Drive, all of which were developed by defendant Tull from 1975 onward. Approximately 150 feet to the south of and parallel to Sea Shore Drive is Bunker Hill Campground Road.

The defendant claims to have owned all the lots in Ocean Breeze Subdivisions. At various intervals, beginning in 1975, and continuing until the present, the defendant either leased or sold these lots in Ocean Breeze to third parties, many of whom have placed mobile homes on their parcels. Defendant Tull is currently involved in a separate lawsuit with regard to the title to some of the area in the Ocean Breeze subdivision, but for

this Court's purposes, that litigation is not material to this lawsuit. As of the date of trial, Lots 4, 14, 19, 64, 65, 66, 67, 68, 69, 70, 74, 76, 96, 97, and 106 were still owned by the defendant. Currently, the defendant also owns lots 7C, 8C, 9C, 10C, 11C, 11B and the drainfield lots. The defendant realized approximately $5,000 net profit per lot for the sales of the lots in Ocean Breeze Mobile Home Sites.

Mire Pond I and Mire Pond II Camper Sites are located a few miles northeast of the Ocean Breeze Mobile Home Sites. The Mire Pond properties also lie east of Chincoteague Channel. Fowling Gut borders the Mire Pond properties to the west. Virginia State Route 2102 abuts Mire Ponds I and II to the east. (See Ex. 116 which shows both sections).

Mire Pond I consists of twenty-nine smaller sized and sometimes irregularly shaped lots, suitable for the placement of camper trailers. At no time material to this action did the defendant own the lots in Mire Pond I. Although the present owners of the lots in Mire Pond I purchased their properties directly from the defendant's parents, who were the then title holders to those properties, the defendant played the instrumental and paramount role in the development and sale of the lots located in Mire Pond I and otherwise dealt with them as his own.

Mire Pond II adjoins Mire Pond I to the northeast. It is composed of twenty-five lots. At one point, the defendant owned all the land comprising Mire Pond II. Lots 1(a), 6(a), 7(a), 8(a), 9(a), 10(a), 11(a), 12(a), 13(a), 14(a), 15(a), 16(a), 19(a), 20(a), 21(a), 22(a), and 25(a) are presently owned by the defendant. A preliminary injunction issued by this Court at an earlier date, which currently remains in full force and effect, prohibits the defendant from conducting any filling activities whatsoever on Mire Pond II. The defendant and those for whom he acted recognized approxi-

mately $5,000 net profit per lot for the sale of lots in Mire Pond I, as well as Mire Pond II.

The third property involved in this lawsuit, Eel Creek, lies west of Assateague Charnel and Piney Island and flows into Little Oyster Bay. Chicken City Road is to the west of the Eel Creek property, with the Eel Crek waterway itself, abutting the land to the east. The Highland Park Development projects bounds the subject property to the northwest and the Donald Birch property to the southeast. On Exhibit 58 the property identified as "Edward L. Tull" has been split by a road owned by Tull which runs down the middle thereof from Chicken City Road to Eel Crek. The northeastern side of the road is still owned by Tull, a portion of which is in contention in this litigation. The southwestern side of the road is owned by Donald Birch. Although the Donald Birch land was filled by Tull, it is not in contest herein nor has the United States made the new road a part of this litigation.

The defendant owned the described property at Eel Creek. At trial, he testified that at present there exists pending contracts for the sale of certain parcels. The defendant has traded with Donald Birch one-half of his Eel Creek property which is further upstream from Little Oyster Bay. Others (specifically including William M. Birch and the government—highway department) have also obtained rights along Eel Creek which are further upstream.

Asserting a special grant from the sovereign, the defendant also claims ownership to the bottom of Eel Creek itself. The evidence, however, failed to show an unbroken chain of title spanning from an original special grant of Eel Creek by the sovereign to the defendant. Nonetheless, even though the defendant may have acquired rights to the other side of Eel Creek, he could not extinguish the public's rights to the waterway, nor those of others who are upstream. Nor can he extinguish the rights of the United States to its navigable servitude.

The defendant now owns or at one time owned three dump trucks, a front-end loader and a tractor equipped with grading blade. Additionally, the defendant owns and maintains a borrow pit from which vast amounts of fill material were taken and hauled to the subject properties.

On July 21, 1976, several members of the Norfolk District Army Corps of Engineers visited the defendant's properties on the island of Chincoteague in order to determine the "Corps' jurisdiction" as to any filling activity to be conducted thereon. Although the Chief of the permitting section was not present at this meeting, his immediate subordinate, one Caruthers, was present. For most of the inspection, the defendant was also present.

After briefly viewing a site not at issue in this litigation, the group proceeded to the Ocean Breeze Mobile Home Sites. They approached Ocean Breeze Mobile Home Sites from the Northwest corner (Lots 1-2; 23-30) of the property and proceeded toward Fowling Gut. Caruthers noticed what he believed were wetlands adjacent to a filled area in the Northwest corner and advised the defendant that he would need a permit to fill that area. Thereafter Caruthers walked in a southerly direction across the filled area. The defendant remained in the northwest corner of Ocean Breeze Mobile Home Sites. No further conversation was had between members of the Corps and the defendant. The defendant at no time inquired of anyone as to whether he would be allowed to fill in the southern or western portions of Ocean Breeze Mobile Home Sites without first obtaining a permit. Nor has the defendant acquired nor ever applied for a permit.

The group then viewed the Eel Creek Site. Apparently no conversation was had between the members of the Corps and the defendants during the group's visit to the Eel Creek property. Prior to this visit, however, a formal

notice was sent by the Corps to the defendant on March 3, 1976, ordering the defendant to "cease and desist all further filling in Eel Creek or its wetlands until such time as you [the defendant] have obtained Department of the Army permit." On August 25, 1976, a follow-up letter from Colonel Newman Howard indicated that the cease and desist order would remain in effect, that decision having been confirmed by the July 21, 1976 visit to the Eel Creek site.

From 1978 through 1982, James and Donald Ballard worked almost exclusively for the defendant. Apart from some minor repair work and grass cutting duties, the Ballards devoted virtually all their time to the operation, service and maintenance of the defendant's hauling, loading and grading equipment. They were hired to haul sand to Ocean Breeze Mobile Home Sites.

Another independent haules, one Alexander J. Justice, also hauled sand to the Ocean Breeze Mobile Home Sites for the defendant. Justice was paid for at least thirty-four days of hauling.

An aerial photograph of the Ocean Breeze Mobile Home Sites area shows the lots west of Ridge Road (Lots 23-70) were undeveloped as of November, 1975. This photograph shows filling on Lots 1-22 and Lots 93-104. There was, however, no filling on what are now Lots 71-92 and/or Lots 115-119.

The defendant testified that he filled Ocean Breeze Mobile Home Sites Lots 1-22 in 1974-75, filled Lots 104-114 in 1975-76, filled Lots 93-103 in 1975-76, and that filling on Lots 82-92 commenced sometime during 1976-77 and continued through 1979. Filling on Ocean Breeze Mobile Home Sites Section B began in 1976 and continued through 1979. Filling on Ocean Breeze Mobile Home Sites Section C occurred in 1979-80. A revision to the defendant's 1975 survey plat (Ex. 55A) indicates that Lots 120-121 were developed sometime between 1978

and 1979. According to the defendant, the only filling which occurred during 1982 was the filling of some drainfield lots. The government does not seek relief for any filling activity on Lots 1-22 as that was likely completed prior to July 25, 1975. *See* 33 C.F.R. § 323.3(a)(1).

An estimated 20,000 cubic yards of sand were used to fill the Ocean Breeze Mobile Home Sites. Filling activity by the defendant on the Ocean Breeze Mobile Home Sites occurred on at least one hundred separate days. At no time did the defendant apply for, nor did the United States Army Corps of Engineers issue to him, a permit for filling any of the Ocean Breeze Mobile Home Sites.

Similarly, Donald and James Ballard, under the direction of the defendant, hauled sand to fill the Mire Pond Camper Sites. The defendant admitted filling Mire Pond I on behalf of his father, but insists that he remained ten or twelve feet back from a self-imposed restricted area. He professed not to have knowledge as to the identity of the individual or individuals who filled this restricted area. The defendant did, however, state that he aided one lot owner in the construction of a bulkhead. On those lots abutting Fowling Gut (Lots 22, 23, 24, 25, 26), he estimates the fill he placed there to be approximately three feet deep.

Recent photographic slides taken of this area indicate that the majority of the filling on Mire Pond II has occurred since February 1982. As of May 5, 1982, fill material had been placed on those Mire Pond II lots abutting a fence which separates Mire Pond II from Mire Pond I. Thus, it would appear that at least portions of lots 4A, 5A, 6A, 7A, 8A and 9A had some fill material.

Donald and James Ballard also were employed by and directed by the defendant to discharge fill material, namely sand and oyster shells, on the Eel Creek property at various intervals from approximate the year 1977 until and including the duration of this action. Filling

on the Eel Creek site was achieved principally by means of bulldozing and grading of a hill located on the upper-portions of this property. The defendant owned the grading equipment used by the Ballards in the filling of the Eel Creek Site. Akin to his actions vis-a-vis the Ocean Breeze Sites and the Mire Pond Sites, the defendant did not apply for a permit prior to engaging in any filling activity on the Eel Creek property.

The government introduced substantial credible evidence to show that the fill material placed by the defendant on portions of these properties was placed on land which was typically tidal, marsh or bog in character. Soil analyses were performed by the government's experts upon various samples taken from portions of some of these properties to determine the composition of the vegetation lying beneath the fill material.

Government field scientists extracted soil samples from a site located on Lot 121 on Ocean Breeze Mobile Home Sites and from a point on property situated between Lot 120 and Fowling Gut. A subsequent analysis of these samples showed that peat lies beneath the fill material. Peat is wetland plant material with a high water content which causes anerobic soil conditions and which is usually found near the surface. This sample also revealed an abundance of spartina alterniflora, an obligate wetlands species. In combination, peat and spartina alterniflora strongly indicate the existence of a wetland type environment.

Similar analyses were performed upon random soil samples taken from sites on Lots 39(B), 59(B) and 72 (B) in Ocean Breeze Mobile Home Sites Section B. The sample taken from Lot 39(B) showed a predominance of peat and spartina patens, a facultative plant species which may appear in wetlands or uplands. The analyses performed upon the soil samples taken from Lots 59(B) and 72(B) showed peat and distichlis spicata. Distichlis

spicata is generally recognized as an obligate wetland species.

Samples taken froma site on Lot 9(C) likewise showed all peat. Although the vegetation was not distinguishable, a few loblolly pine needles were found in the sample. Loblolly pines usually are found on the ridges of wetlands and their branches and needles frequently project over wetland areas.

Core samples from property immediately adjacent to Ocean Breeze Mobile Home Sites were also examined. From four sites on property adjoining the northeasternmost section of Ocean Breeze Mobile Home Sites, the government's field scientists discovered peat, mixed with a small amount of sand, and distichlis spicata. A sample was likewise taken from property immediately adjoining Ocean Breeze Mobile Home Sites to the south. This sample revealed peat and spartina alterniflora, an obligate wetland species. A sample taken from property lying further south showed an abundance of sand, from which the remnant plant parts could not be identified.

Because the topographic evidence tended to show that a ridge and swale system had formed in portions of Ocean Breeze Section B and the property adjoining it to the northeast, the Court engaged the services of an independent expert witness, Professor Donna M. E. Ware, to determine the speciation of the flora found within this apparent ridge and swale system. Accompanied by the Court and counsel for all parties, Dr. Ware visited this section of the island and examined the vegetation. She opined that the species of saltmarsh grasses (spartina patens, distichlis spicata and spartina alterniflora) and the iva frutescence she observed on the dune swales in this system had developed under "a regime of tidal connection with saltmarshes" on the southwest sector of Ocean Breeze Mobile Home Sites Section B. Dr. Ware further was of the opinion that these swales supported

other species which are known to exist in both brackish and fresh water conditions. Dr. Ware believed that, with the sole exception of polygonum punctatum (dotted smartweed), these facultative species also developed due to a tidal connection with those marsh grass species lying to the southwest of Ocean Breeze. It was Dr. Ware's opinion that the polygonum punctatum probably invaded the saltmeadow habitat when the system became less saline subsequent to the curtailment of the described tidal connection.

Other evidence tended to show that the soil taken from these sample sites was saturated and was subject to tidal inundation. Dr. John Clay, a soil scientist, also examined the composition of the soil taken from lots near the southern end of Route 2102 in order to ascertain the soil's color, wetness and texture. Dr. Clay opined that the soil he examined reflected a high phase tidal marsh, which was subject to flooding by tidal action. Likewise, Mr. Sumner, an Environmental Scientist for the Environmental Protection Agency, stated that the soil at the sample sites was in a saturated condition. Indeed, the Court itself observed saturated and marsh type soil conditions on the western portions of the Ocean Breeze Mobile Home Sites during the Court's September 20, 1982 view of that property.

Two major sources provide the tidal waters which flow into Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B. One system originates from Assateague Channel, while the other system originates from Fowling Gut, each of which is a navigable waterway. The ridge and swale system which comprises a great percentage of Ocean Breeze Mobile Home Sites Section B is apparently (or was prior to filling) interconnected by means of marshes and small streams, flowing to Black Point Drain and Assateague Channel.

The area now encompassed by the Ocean Breeze Subdivision is shown on geological survey maps published by

the Department of the Interior of the United States for civilian use. These maps show a substantial portion of Chincoteague Island. Plaintiffs' Exhibit 135A, is a map dated "1943" and contains a stamp date of December 12, 1962 stamped thereon; plaintiff's Exhibit 10, is dated 1965 and was "photoinspected 1973"; on the rear side of Exhibit 10 and attached thereto is a map dated 1965; and Ex. 134A is the 1965 map photoinspected as of 1979. Exhibit 10 shows that Fowling Gut (as labeled on that plat) is beneath what is now Ocean Breeze Mobile Home Sites. Fowling Gut continued on to Andrews Landing Gut and thereafter into Assateague Channel. The 1943 map shows the entire area of what is now the Ocean Breeze Subdivisions as swamp. The 1973 photoinspected map shows that the Ocean Breeze Subdivision include both swamp and water filled land together with some dry land.

There is no question that the Ocean Breeze subdivisions (including Sections B and C) contained substantial swamps, waterways and ponds prior to the defendant's acquisition and filling. A mere glance at Exhibit 134A, the photoinspected 1979 official map, shows that Sections B and C of Ocean Breeze lie between what is shown on that official map as "Trailer Park" and the non-labeled record as being mostly ponds and water connected to tidal areas. This area of ponds and swamp was filled and later became Sections B and C of Ocean Breeze. The defendant contends that these ponds and the water therein was fresh water and non-tidal. The Court finds that it was tidal water and that the only reason that any portion may have become something other than tidal water (i.e., fresh water) was due directly to and as a proximate result of the defendant's filling activities thereon. The Court specifically declines to lend credence to those witnesses for the defendant who testified contrary to this finding.

The Court finds that the defendant filled in wetlands on the tidal and navigable waters of the United States

located on the following lots in Ocean Breeze Mobile Home Sites: 120, 121, 39B, 59B, 62B, 71B and 72B, all of which were either under water at the time of the Court's view or were shown by core samples to have been wetlands.

Lots 7C, 8C, 9C, 10C and 11C in Ocean Breeze Mobile Home Sites are or were wetlands on the waters of the United States. Any fill located on these said lots designated with a C shall be removed and restored by the defendant in accordance with the directions of the Army Corps of Engineers.

The Court further finds that part or portions of the following streets were at one time wetlands of the navigable waters of the United States filled by the defendant without a permit: Sea Breeze Drive, Sea Gull Drive, Sea Shell Drive, Sea Spray Drive, Sea Horse Drive, Sea Shore Drive and Ridge Road.[3]

The Court finds that more than one day each of filling activity by the defendant occurred with regard to each and every lot and each and every street above-mentioned as having wetlands thereon which were filled by the defendant, as well as a minimum of one day for each and every street above named.

At Mire Pond I, soil analyses were performed on samples taken from Sites on Lots 25 and 29. In the sample taken from Lot 25, peat and spartina alterniflora were found. An examination of the sample extracted from Lot 29 revealed the presence of peat, a substantial amount of distichlis spicata and a random incidence of spartina patens, all of which are found in wetlands.

In examining the aerial photographs and considering all of the evidence, substantial portions of Lots 22, 23, 24, 25 and 26 were wetlands subject to tidal action in Septem-

[3] In addition, the Court finds that several of the lots designated "Drainfields for Lots" were wetlands in 1977.

ber, 1977, and were part of the "waters of the United States."

A field survey of the surface vegetation was made by the government's field scientists on December 14, 1981 in Mire Pond II.[4] The government's field survey disclosed the existence of spartina alterniflora on what appears to be Lots 13A and 22A. Reeds (a facultative plant) and spartina patens has been growing on portions of Lots 8A, 9A and 10A. Spartina patens, distichlis spicata and iva frutescence were observed on portions of Lots 4A, 5A, 6A and 7A. The Court itself walked upon this land in September of 1982 and portions of Lots 8A, 9A, 10A, 11A, 12A, 22A and 13A were under water. Lot 8A had contained some fill material. The Court finds that Lots 8A, 9A, 10A, 11A, 12A, 22A and 13A are wetlands and within the waters of the United States and are tidal waters.

During its view of the Mire Pond Camp Sites, the Court observed crab pots lying at the bottom of Mire Pond itself. The water was approximately five or six feet deep and flowed into Fowling Gut which likewise appeared to be four to six feet deep. It is this same Fowling Gut which once flowed through what is now Ocean Breeze into Assateague Channel, which now only flows into Chincoteague Channel from Mire Pond. At the time the Court viewed the premises, there was approximately 9 inches of standing water on Lot 8A, and that lot was undoubtedly a swamp.

The Court finds the marsh-type environment located at Mire Pond II was essential for the sustenance of the marine ecosystem in that area.

The Court further finds that this wetlands march (inundated by tidal water) which existed in Mire Pond II at the time of the view likewise existed in Mire Pond

[4] See Exhibit 78.

I prior to the filling therein by the defendant. The testing, the natural countour of the land and the plant material found in Mire Pond I and II indicate that Lots 22, 23, 24, 25, 26 and 29 of Mire Pond I are or were partially or completely filled wetlands, having been filled by or at the direction of the defendant. Five of these lots abutted Fowling Gut (at this point called Mire Pond) itself, were subject to tidal inundation and were thus part of the waters of the United States. The Court finds that the defendant was responsible for the fill material deposited on the above-enumerated lots. The Court further finds that the defendant filled Lots 8A, 22, 23, 24, 25, 26 and 29 of Mire Pond I and Mire Pond II without first applying for the necessary permits from the United States Army Corps of Engineers as these lots were part of the waters of the United States. The Court finds at least one day of filling occurred at the plaintiff's direction for each of the above-enumerated lots or a minimum of seven separate days of filling on said six lots in Mire Pond I, and at least four separate days of filling in Mire Pond II wetlands.

On the defendant's property at Eel Creek, there was shown the presence of peat, spartina alterniflora and spartina patens, all wetland species. Eel Creek is a navigable waterway and is tidal in nature flowing into Little Oyster Bay which flows into Assateague Channel. In viisting the Eel Creek property on September 20, 1982, the Court observed marsh covering all but the northernmost 15 feet of the adjacent Lot 14 in the Highland Park Development. The topography of the land would indicate that the adjacent property followed the natural contour as shown in the hatched area on Exhibit 6A. At the time that the view was made, the adjacent Highland Park Lot 14 was under water, except for the northernmost 15 feet thereof.

Akin to Mire Pond, the marsh located at Eel Creek furnishes necessary nutrients to the fish and other marine inhabitants of Eel Creek.

The evidence showed that approximately 6,000 square feet of land had been filled, not including the proposed road built by the defendant and the area of a like amount which the defendant has already sold to another purchaser.

The defendant contends that since he filled the part of the propety with oyster shells and other material which he claimed were natural, he did not pollute or contaminate existing wetlands. The Court wholly rejects this view.

Therefore, the Court finds that the defendant filled on his property at Eel Creek the northern 6,000 square feet, that this placement of fill took more than two days, and that the fill material was placed in waters of the United States without the defendant having first applied for the necessary permits from the United States Army Corps of Engineers.

The Court finds that the defendant has continued the violation of the statutes in relation to filling material for more than 365 days in each instance.

II.

Based upon observations made by this Court during its September 29, 1982 view of the property and upon the evidence adduced during the course of the hearings, the Court became curious as to whether a waterway in excess of 40 feet in width, which at one time apparently traversed Ocean Breeze Mobile Home Site, was an issue to be considered by the Court in this case. The government responded affirmatively.

The defendant claimed that he was unaware that the government intended to pursue any alleged filling of this former waterway and stated that he had not conducted sufficient discovery with regard to this issue as would enable him to mount a defense. In consideration of the parties' relative positions, the Court deferred the claim

advanced by the government referring to this waterway, and allowed the parties additional time for discovery and rescheduled the trial of this claim for a future time. The trial was resumed as to this issue after the completion of discovery by the defendant.

On or about January 26, 1963, Nat Steelman, a retired oyster inspector, and other watermen commenced the digging of this contested Fowling Gut Extended waterway at the expense of the United States. The waterway was dug as the result of the severe storm of Ash Wednesday of 1962 and was ostensibly for mosquito control purposes. An ancillary purpose for construction of the waterway was to facilitate and encourage boat traffic.[5]

Fowling Gut Extended was excavated in such a manner that it had a minimum depth of four feet at mean low water and a width of a minimum of forty feet. The property owners (Tull's predecessors in title) were compensated by the government.

Fowling Gut, as distinguished from Fowling Gut Extended (that portion which once ran through and under what is now this subdivision) prior to 1962 had two outlets to Chincoteague Channel by causeway under Main Street on State Route 2114. One of these causeways is at a point near the northeastern corner (Lot 30) of Ocean Breeze Subdivision and one near the northeastern corner of the subdivision (Lot 121). Fowling Gut naturally ran in an east/west direction along the northern boundary of the subdivision between these two causeways and thence ran in a short distance approximately 100 feet in a southerly direction along the eastern boundary of the subdivision (Lots 29 and 30) and then turned and proceeded eastwardly towards Mire Pond and the more populated part of the island and higher ground. It was at this turning point (Lot 29) that Fowling Gut

[5] See Exhibit 141-1 (letter to Roy C. Tolbert, Treasurer of Chincoteague Mosquito Control Commission, dated March 25, 1963).

Extended was excavated in a straight line in 1963 in a southwesterly direction diagonally across what is now the subdivision of Ocean Breeze and that portion under Ocean Breeze is now located under what would be the letter "g" in the word "Fowling" on what is designated as the Coast and Geodetic Survey Map, Exhibit 10, and continued in a southwesterly direction not only through said subdivision but ultimately to Andrews Landing Gut which emptied into "The Canal" on one side and "Assateague Channel" on the other side. This excavation, in effect, created at least two additional islands in the southwestern portion of Chincoteague. Part of what is now Ocean Breeze Subdivision would have been on the mainland side of Chincoteague and part would have been on the island. Thus, Lots 29 through 33; 44 through 51; 57 through 69; Lots 120 and 121; and some drainfield lots would have been completely separated by tidal water at least forty feet wide and four feet deep at mean low water from the remaining lots of what is now Ocean Breeze Subdivision. Thus, the above-enumerated lots could not have been utilized unless a bridge was built on the waterway or the waterway blocked or obstructed in some manner.

Once completed, the waterway was of sufficient width and depth as to become navigable for large boats and for a brief period boats regularly traveled the entire length of this excavated waterway out to the sea. The Court finds that this waterway, Fowling Gut Extended, was navigable in fact and was utilized by boat traffic subsequent to 1963 and prior to the time when the defendant filled in this waterway without applying for or obtaining any permit from the Army Corps of Engineer. Not only was the waterway blocked by the defendant in this subdivision, but the waterway was also obstructed by the construction of Bunker Hill Campground Road by the defendant which is not a part of this particular litigation.

Two November 1975 aerial photographs of the partially developed Ocean Breeze Mobile Home Sites show this waterway still flowing across the property as an open navigable waterway. By late summer of 1976, the section of the waterway which traversed Ocean Breeze Mobile Home Sites was blocked by fill material. The filling of this waterway took place in late 1975, 1976, 1977 and thereafter.

The Court finds that the filling of Fowling Gut Extended, the portion of the waterway beneath what is now Ocean Breeze Subdivision, took more than fifty separate days of filling operation insofar as that portion contained in what is now Ocean Breeze Mobile Home Sites. The evidence indicated that no other individuals or concerns were engaged in filling activity on the Ocean Breeze Mobile Home Sites property during the years in question and the Court from the testimony of the defendant, the various persons engaged in the filling operation, the aerial photographs and the other evidence finds that the defendant was the sole person engaged in the filling of this waterway and that such filling was either done personally by him or at his direction or under his supervision insofar as Ocean Breeze Mobile Sites are concerned. The defendant neither applied for nor obtained any permit from the Corps of Engineers to fill and obstruct this navigable waterway which clearly falls within the ambit of "waters of the United States." Moreover, the defendant profited by his sale of these lots which would not have been accessible as well as those lots (some 40,000 square feet) that were actually a filled navigable waterway. The violation has continued for more than 365 days.

III.

Jurisdiction over this action is conferred pursuant to 28 U.S.C. §§ 1331 and 1345.

Pursuant to 33 U.S.C. § 403, the creation of any obstruction not affirmatively authorized by Congress to the

navigable capacity of any of the waters of the United States is prohibited. Nor shall it be lawful to fill or in any manner alter or modify the course, location, condition or capacity of any canal unless the work is authorized by the Secretary of the Army. 33 U.S.C. § 403 (1970). This statute was enacted by Congress to give the federal government jurisdiction to prevent private parties from obstructing navigable waters of the United States. *United States* v. *Logan & Craig Charter Service, Inc.*, 676 F.2d 1216 (8th Cir. 1982); *United States* v. *Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976).

There is no requirement that a body of water must sustain actual commerce in order to meet the test of navigability sufficient to support the Corps' jurisdiction over a proposed obstruction. Rather, the mere capability of commercial use of a body of water will suffice, even if such commerce is made possible with the addition of artificial aids. *Weiszmann* v. *District Engineer, United States Army Corps of Engineers*, 526 F.2d 1302, 1305 (5th Cir. 1976) [*quoting United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940)] *See Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *United States* v. *DeFelice*, 641 F.2d 1169 (5th Cir. 1981. Moreover, the lack of commercial traffic does not foreclose a determination of navigability under this section where personal and private use of boats demonstrates the capability of a waterway for simpler types of boat traffic. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 416 (1940); *United States* v. *Utah*, 283 U.S. 64, 82 (1931); *United States* v. *Pot-Nets, Inc.*, 363 F. Supp. 812 (D. Del. 1973).

A private waterway may fall within the ambit of navigable waters of the United States if it joins an existing interstate commerce waterway. *See Kaiser Aetna* v. *United States, supra.* Consequently, private canals which are subject to the ebb and flow of the tide and are navigable in fact because they are capable of

flow in the stream of interstate commerce and are or may be so used constituting navigable waterways of the United States for purpose of the Corps' jurisdiction under 33 U.S.C. § 403. *See Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963).

The discharge of any pollutant by any person is expressly prohibited by law, except as provided in sections 1312, 1316, 1317, 1328, 1342, or 1344 of Title 33. 33 U.S.C. § 1311 (1978). Discharge of a pollutant is defined in § 1362 of Title 33 as any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362 (12) (1978). A point source means any discernible, confined and discrete conveyance from which pollutants are discharged. 33 U.S.C. § 1362(14) (1978). As intended by the statute, the term pollutant means any dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, biological materials, radioactive materials, wrecked or discarded equipment, rock, sand, cellar dirt, industrial, municipal waste or agricultural waste, which is discharged into water. 33 U.S.C. § 1362(6) (1978).

Bulldozers and dump trucks constitute point sources from which pollutants can be discharged within the meaning of Federal Water Pollution Control Act. *United States* v. *Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980); *United States* v. *Holland*, 373 F. Supp. 665, 668 (M.D. Fla. 1974).

Similarly, it has been held that fill material constitutes a pollutant within the statutory definition as expressed in 33 U.S.C. § 1362(6). *United States* v. *Weisman*, *supra*. Fill material composed of sand and debris would necessarily be considered an offending pollutant. *United States* v. *Bradshaw*, 541 F. Supp. 880 (D. Md. 1981).[6]

[6] The United States Army Corps of Engineers regulations define fill material as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(m) (1981).

Pursuant to 33 U.S.C. § 1344(a), the Secretary of the Army is authorized to issue permits for the discharge of fill material into navigable waters of the United States at specified disposal sites. 33 U.S.C. § 1344(a) (1978).

The statute defines the term navigable waters as waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7) (1978). In so doing, Congress intended to give to the term navigable waters, the broadest constitutional interpretation. *Deltona Corp* v. *United States*, 657 F.2d 1184 (Ct. Cl. 1981); *United States* v. *Byrd*, 609 F.2d 1204 (7th Cir. 1979). Jurisdiction over waters of the United States is said to extend "well beyond the mean high water mark to marsh wetlands which are regularly or periodically inundated." *Conservation Council of North Carolina* v. *Costanzo*, 398 F. Supp. 653 (E.D. N.C. 1975); *aff'd* 528 F.2d 250 (4th Cir. 1975).

The Army Corps of Engineer regulations further define "waters of the United States" to include coastal and inland waters, rivers and streams that are navigable waters of the United States, including any adjacent wetlands. 33 C.F.R. § 323.2(a)(2) (1981). The term "navigable waters of the United States" is described by the regulations as "those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce. 33 C.F.R. § 323.2 (b)((1981). As used in 33 C.F.R. § 323.2(a)(2) above, the term "wetlands" includes those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions. 33 C.F.R. § 323.2(c) (1981).

Wetlands generally include swamps, marshes, bogs, and similar areas. Consistent with this definition of wetlands,

Congress and the courts have interpreted the term wetlands to include marshes, bays, and estuaries of waterbodies subject to tidal inundation. *Leslie Salt Co.* v. *Froehlke, supra; Avoyelles Sportsmen's League, Inc.* v. *Alexander*, 511 F. Supp. 278 (W.D. La. 1981); *Conservation Council of North Carolina* v. *Constanzo, supra; United States* v. *Darden*, C/A No. 81-652 (E.D. Va. February 2, 1982) (unpublished).

IV.

The defendant has raised several affirmative defenses to the government's claims. Based upon the evidence adduced at trial, the Court concludes that the affirmative defenses advanced by the defendant do not relieve him from liability for violations of 33 U.S.C. § 403 and § 1344.

The defendant first argues that the statute and the regulations upon which the government relies as the bases for the exercise of its regulatory powers as they have been enforced in the Norfolk District against the defendant (presumably 33 U.S.C. §§ 1311, 1344 and 33 C.F.R. § 323, *et seq.*) are unconstitutional in that the enforcement thereof amounts to a taking of property without compensation in violation of the Fifth Amendment to the United States Constitution. At trial, the Court granted summary judgment in favor of the government as to this issue. Because the defendant has admitted that he never attempted to obtain an Army Corps of Engineers' permit prior to the filling of any of the properties at issue in this litigation his "taking" claim is not yet ripe for resolution. In *United States* v. *Byrd, supra*, the Seventh Circuit was faced with a similar argument from a defendant who had not yet applied for a permit from the Army Corps of Engineers. Holding that the defendant's argument was premature, the Court explained that, absent the rendering of some formal decision on the defendant's application by the Army Corps of Engineers, the defendant would be assuming a "taking" which may never

materalize. *Id.* at 1211. *See also Deltona Corporation* v. *Alexander, supra.* Exhaustion of administrative remedies must necessarily precede any Court's review of a particular agency's action. Defendant Tull's failure to even attempt to exhaust his administrative remedies by applying for a permit from the United States Army Corps of Engineers renders his taking issue untimely.

The defendant next contends that 33 U.S. §§ 1311 and 1344 and the regulation set forth in 33 C.F.R. § 323.3(c) are unconstitutionally vague. As applied to the defendant, these statutes and the implementing regulation are sufficiently definite to have afforded the defendant, an individual of at least ordinary intelligence, fair notice of what conduct was prohibited or required by law. *United States* v. *Harriss*, 347 U.S. 612 (1954). *See United States* v. *Oxford Royal Mushroom Products*, 487 F.Supp. 852, 855 (E.D. Pa. 1980) (terms navigable waters and waters of the United States held not void for vagueness). Furthermore, the Court cannot overlook the evidence indicating that the defendant is a knowledgeable and sophisticated developer, who possesses a rather substantial appreciation for the topography and vegetation on the island of Chincoteague.[7] The defendant's apparent familiarity with Chincoteague island vegetation belies the existence of any misapprehension on his part as to what the pertinent statutes and regulations required of him.

The defendant also seeks to invoke the doctrine of equitable estoppel against the government for statements not uttered and actions not taken by members of the Army Corps of Engineers during the period in which they were allegedly aware that filling was occurring on

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[7] For example, when asked by the Court to describe what he considered to be a marsh, the defendant responded that it was low lying land which could contain water. The defendant also opined that a portion of Lot 22(A) on Mire Pond II inspected by the Court and the parties during its September 20, 1982 view of the property might be marshland.

these properties. The defendant cites the July 21, 1976 visit to the Ocean Breeze Mobile Home Sites as one instance during which the Corps' silence "misled" him. It was during the July 21, 1976 visit that one of the Norfolk District engineers made specific reference only to a prohibition against further filling on the northwest sector of Ocean Breeze Mobile Home Sites. The defendant submits that the government should now be estopped from claiming improper filling activity on other portions of Ocean Breeze Mobile Homes Sites since they were not specifically mentioned during the course of that site visit.

Likewise, the defendant asserts that, although government officials have long been aware that filling has occurred on the Mire Pond Camper Sites and the Eel Creek sites, they have taken no affirmative measures, apart from the commencement of this action, to discourage or prevent the continuation of these activities.

The Court finds this contention of the defendant is without foundation as the Court feels that the agents of the United States government did not mislead the defendant. Particularly with regard to the Eel Creek property, there is no evidence that the Army Corps of Engineers stood idly by while an endless parade of the defendant's dump trucks and bulldozers passed in review. To the contrary, a formal cease and desist order was issued by the Army Corps of Engineers in August of 1976, prohibiting the defendant from any further filling on the Eel Creek property until the defendant had applied for a permit. And as to Mire Pond II, the plaintiff obtained an injunction prohibiting the defendant's filling activities thereon.

Notwithstanding the evidence of the government's more than tepid interest in the defendant's filling activities, inaction or tacit acquiescence by government officials as to unlawful conduct alone cannot provide the basis for the imposition of an equitable estoppel against the United States of America. The general rule is that the United States is neither bound by nor estopped by the acts of

its officers or agents in entering into an arrangement to do or cause to be done what the law does not sanction or permit. *See Federal Crop Insurance Corp* v. *Merrill*, 332 U.S. 380 (1947); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917). The United States Supreme Court has intimated, but not yet stated conclusively, that perhaps some affirmative conduct by the government's agents might warrant an exception to the general rule against the invoking of an equitable estoppel against the government. *See, e.g., Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981).

In *Deltona Corporation* v. *Alexander, supra*, the Eleventh Circuit held that the record failed to disclose evidence of any affirmative conduct on the part of government officials sufficient to estop the government from denying dredge and fill permits to a developer even though government officials had known of development plans from their inception and had unofficially endorsed the plans. *See United States* v. *Harvey*, 661 F.2d 767 (9th Cir. 1981) (affirmative conduct must be shown in order to invoke equitable estoppel against the government.)

The evidence here failed to disclose any statements or conduct of an affirmative nature conveyed by government officials to the defendant which could have caused the defendant to believe that he was authorized to fill those properties not specifically designated during the visits to the site or contained within the correspondence between the parties without first applying for a permit from the Army Corps of Engineers. Moreover, it has not been shown that any silence or inaction by the government was purposefully designed to mislead or confuse the defendant. The Court therefore finds no basis upon which to invoke the doctrine of equitable estoppel against the United States. *See United States* v. *Board of Trustees of Florida Keys Community College*, 531 F. Supp. 267 (S.D. Fla. 1981) (government agent's delay in issuing a cease and desist order will not estop the government from

enforcing violations under Rivers and Harbors Appropriation Act of 1899 and the Federal Clean Water Act).

Moreover, the defendant and the plaintiff were engaged in other adversary court actions during the relevant time period on different properties. The defendant was thus well aware of the necessity for applying for permits.

The defendant neither requested an application for a permit nor has he obtained a permit for any of the properties involved herein, or indeed any of his properties. Rather, the defendant has chosen to purposely disregard the regular manner of determination in order to assert some basis as justification of his illegal activities. Avoidance is always permissible but the defendant's activities appear to this Court to have been a deliberate attempt at evasion and misdirection by the defendant. Such actions would never support a claim for an estoppel even were the government not involved.

The defendant also argues that the issue as to whether the Army Corps of Engineers has regulatory jurisdiction over Ocean Breeze Mobile Home Sites, Mire Pond I and II and Eel Creek has already been litigated in *United States* v. *Tull*, C/A No. 75-319-N (E.D. Va. November 12, 1975) (unpublished) and *United States* v. *Tull*, C/A No. 73-304 (E.D. Va. March 21, 1974) (unpublished) and therefore should not be relitigated under the principles of collateral estoppel. A copy of the opinions rendered in those two actions was introduced into evidence by the defendant.

The doctrine of collateral estoppel inhibits a litigant "against whom an issue has been decided in a prior final judgment from relitigating its rejected position in a subsequent proceeding." *Hughes* v. *Heyl & Patterson, Inc.*, 647 F.2d 452 (4th Cir. 1981) [citing *Parklane Hosiery Co. Inc.* v. *Shore*, 439 U.S. 322 (1979)]. For this Court to apply the principles of collateral estoppel, the question expressly and definitely raised in this suit must be the same as that actually litigated and adjudged

adversely to the government in either of the cited decisions involving the defendant Edward Lunn Tull. *Hughes* v. *Heyl & Patterson, supra. See Montana* v. *United States*, 440 U.S. 147 (1979).

Having thoroughly considered all the issues presented in the prior actions, the Court is of the opinion that the resolution of the issues in those cases does not bar the present adjudication of any issue in this case. Indeed, the defendant concedes that different properties are involved. Also, the alleged filling conducted thereon appears to have been of a different character than that which is complained of here. As there would appear to be an absence of identity of issues among the three cases, collateral estoppel will not be applied.

IV.

Pursuant to 33 U.S.C. § 406, a district court is authorized to enforce by injunction, the removal of an obstruction placed in navigable waters in violation of 33 U.S.C. § 403. 33 U.S.C. § 406 (1970). Where the navigable capacity of a particular navigable body of water has been unlawfully altered or modified, a district court maintains the requisite injunctive power to order appropriate restoration. *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960).

The government may also obtain injunctive relief against an offending party for violations of 33 U.S.C. § 1311, pursuant to 33 U.S.C. § 1319(1). A district court may also assess a civil penalty against any person who fails to comply with 33 U.S.C. § 1311 or § 1344. 33 U.S.C. § 1319(d).

As this Court sits in equity, as well as in law, it cannot look favorably upon the defendant's unwillingness to seek the permit required by law for any of his filling activities or upon his failure to discuss any possible alternatives to his proposed filling of wetlands with government offi-

cials. Nor can this Court look kindly upon the defendant's apparent refusal to comply with a cease and desist order issued by a United States government agency. Unlike the plaintiff in *1902 Atlantic Limited* v. *Hudson*, C/A No. 82-533 (E.D. Va. ——, 1983) decided this day, wherein the plaintiff not only applied for a permit, but submitted a plan to mitigate damage as to affected wetlands, defendant Tull has shown scant respect for the preservation of waters of the United States.

It would be inequitable for this Court to allow the defendant to benefit from the commission of an unlawful act. For the sale of each lot which he owned, the defendant realized approximately $5,000 net profit per lot. Moreover, more than one day's illegal activities in filling took place with regard to each lot and more than 365 days' violation has taken place in allowing the illegal fill to remain. Thus, for the filling of the wetlands lots 120, 121, 39(B), 59(B), 62(B), 71(B), and 72(B) on Ocean Breze Mobile Home Sites, the defendant is hereby assessed a total penalty or civil fine in the sum of $35,000.00.

Although the defendant at no time material to this action owned lots 22, 23, 24, 25, 26 and 29 in Mire Pond I, sufficient to have derived a profit from their sale, he nevertheless filled the wetlands therein for his own economic benefit. Similarly, although the defendant has not yet sold lot 8(A) on Mire Pond II, his filling thereon was designed to facilitate their sale, and the Court will assess an appropriate penalty for the unlawful filling of the lots on Mire Pond II. Since the evidence showed that at least one day's filling occurred on each of these lots, the defendant shall be assessed a total penalty or civil fine of $35,000.00 for the filling of Lots 22, 23, 24, 25, 26 and 29 and 8(A).

A $5,000 penalty or civil fine shall likewise be imposed upon the defendant for the filling of the wetlands on the 6,000 square foot parcel of land adjoining Eel Creek.

Further, any fill placed on lots 7C, 8C, 9C, 10C and 11C in Ocean Breeze Mobile Home Sites Section C shall be removed, and those lots restored to wetlands within six months from the date hereof *unless* the defendant is granted an after-the-fact permit by the Army Corps of Engineers. The defendant shall post a $10,000 bond with surety to insure completion of the restoration of these lots.

For the unlawful filling of a navigable waterway of the United States, namely the extension of Fowling Gut, the Court ORDERS the defendant to pay a fine in the sum of $250,000.00. The defendant, Edward Lunn Tull, may suspend the payment of this fine on the specific condition that he restore the extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975, through what is now the Ocean Breeze Subdivision, as provided in this Court's opinion. If the defendant so elects to restore the extension of Fowling Gut, he must file a written election with the Clerk of this Court within ten (10) days from the date hereof and shall post a penalty bond secured by a corporate surety approved by the Clerk of the Court in the amount of $300,000.00, payable to the United States conditioned upon the completion of the restoration within twelve (12) months from the date of this order. Further, the defendant shall restore the waterway under the supervision and to the satisfaction of the United States Army Corps of Engineers in accordance with the instructions contained in the Court's opinion. Equity dictates that the defendant either pay a stiff civil penalty or make appropriate restoration for permanently depriving the United States government and its people of a navigable waterway capable of supporting both commercial navigation and pleasure boating.

The defendant is further ORDERED to restore two lots (other than lots 8(A), 9(A), 10(A), 11(A), 12(A) or 22(A)) in Mire Pond Camper Sites II to wetlands as

part mitigation for the lots unlawfully filled by the defendant in Mire Pond I. Third parties have interests in lots 22, 23, 24, 25, 26 and 29 of Mire Pond, and this Court seeks not to punish them for the acts of the defendant. Additionally, the defendant and those who succeed to his rights are permanently enjoined from further filling of any kind in lots 8(A), 9(A), 10(A), 11(A), and 12(A), 13 (A) and 22(A) (the latter six lots also appearing to be wetlands) on Mire Pond II until such time as appropriate restoration of wetlands as required above has been made, (as approved by and under the supervision of the United States Army Corps of Engineers) *and* until such time as the necessary permits are issued for filling on any of these lots if the Corps of Engineers desires to grant such permits in accordance with its rules and statutes. Restoration thereof shall be completed within six (6) months from the date of this order or within such future date as set by this Court. Prior to any such restoration, the defendant shall post a bond in the sum of $10,000 with surety.

It is further ORDERED that the defendant restore to wetlands all portions of the 6,000 square foot parcel of land abutting Eel Creek (previously discussed in Part I of this opinion), which were owned by the defendant at the time of the filing of any lis pendens or the filing of the suit (whichever was earlier). Restoration shall be completed within (6) months of the date of this order or within such future dates as set by this Court and shall be under the supervision of the Army Corps of Engiiners of the United States. Once appropriate restoration has been made, the defendant shall be permanently enjoined from conducting any filling activities thereon until such time as he shall obtain a permit from the United States Army Corps of Engineers. Prior to the commencement of any such restoration on the Eel Creek property, the defendant shall post a bond in the sum of $5,000 with surety.

It is further ORDERED that the costs of this litigation be borne by the defendant. Included within the costs of this litigation shall be an $800.00 expert witness fee to be paid to Professor Donna Ware, which fee the Court specifically finds is reasonable. Should the defendant fail to pay this fee within thirty (30) days from the date of this order, said fee shall be paid by the plaintiff, the United States of America, which the plaintiff may thereafter recover from the defendant.

The Court will entertain a request by the government for a reasonable award of attorney's fees. Such a request should be submitted within ten (10) days in accordance with the local rules.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia

September 28th, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 81-688-N

UNITED STATES OF AMERICA

v.

EDWARD LUNN TULL

JUDGMENT ORDER

A lengthy trial before the Court has ensued. Based upon the factual findings and legal conclusions embodied within the opinion this day filed, judgment will be entered for the United States of America against the defendant, Edward Lunn Tull, and accordingly a total penalty or civil fine is assessed as follows:

(1) For the filling of the wetlands on lots 120, 121, 39(B), 59(B), 62(B), 71(B) and 72(B) on the various plats of Ocean Breeze Mobile Home Sites, the sum of $35,000.00;

(2) For the filling of lots 22, 23, 24, 25, 26 and 29 in Mire Pond I, and lot 8(A) in Mire Pond II, the sum of $35,000.00;

(3) For the filling of the wetlands on the 6,000 square foot parcel of land adjoining Eel Creek, the sum of $5,000.00.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED:

(A) That the fill placed on lots 7C, 8C, 9C, 10C and 11C in Ocean Breeze Mobile Home Sites Section C shall be removed by the defendant, Edward Lunn Tull, and those lots restored by the defendant, Edward Lunn Tull to wetlands within six months from the date hereof under the direction of the Army Corps of Engineers *unless* the defendant is granted an after-the-fact permit by the Army Corps of Engineers as conditioned in this Court's opinion;

(B) That the defendant, Edward Lunn Tull, shall restore to wetlands all portions of the 6,000 square foot parcel of land abutting Eel Creek under the direction of the Army Corps of Engineers as provided in the Court's opinion;

(C) That the defendant, Edward Lunn Tull, for the unlawful filling of the extension of Fowling Gut, shall pay a fine in the sum of $250,000.00, however, the defendant may, by an election duly filed in writing in the Clerk's Office of this Court, within ten (10) days from the date hereof, obtain a suspension of said fine on the condition that the defendant, Edward Lunn Tull, agree to restore the extension of Fowling Gut to its former, navigable condition as it existed between 1963 and November 1, 1975, as provided in this Court's opinion, but in which event, the defendant shall post a penalty bond payable to the United States with a corporate surety approved by the Clerk of this Court in the sum of $300,000.00 conditioned upon his restoration within one year of the date of this order said extension of Fowling Gut under the directions of the Army Corps of Engineers in accordance with the Court's opinion this day filed.

(D) That the defendant, Edward Lunn Tull, convert to wetlands two lots in Mire Pond Camp Sites Section II other than lots 8(A), 9(A), 10(A), 11(A), 12(A) or 22(A) as part mitigation for the lots unlawfully filled by the defendant in Mire Pond I.

The defendant, Edward Lunn Tull, and his successors and/or assigns are permanently enjoined from any filling of any kind of lots 8(A), 9(A), 10(A), 11(A), 12(A), 13(A) and 22(A) in Mire Pond Section II until such time as the necessary permits are issued for filling on any of the lots if the Army Corps of Engineers desires to grant such permits in accordance with its rules and regulations and the statute applying thereto.

IT IS FURTHER ORDERED that the chargeable costs of this litigation be borne by the defendant and including therewith shall be at $800.00 expert witness fee to be paid to Professor Donna M. E. Ware by delivering to the Clerk of this Court the sum of $800.00, which sum shall be transmitted by said Clerk to Professor Ware. Should the defendant fail to pay said sum to the Clerk of this Court for transmittal to Profesor Ware within thirty (30) days from the date hereof, then said amount shall be paid by the United States and shall be a chargeable court cost.

All removal, restoration to and/or conversion to wetlands shall be completed within six (6) months from the date of this order unless an extension of time is granted by this Court, except that the restoration of Fowling Gut Extended shall be completed within nine (9) months from the date hereof.

The plaintiff shall file any requests for attorney's fees and expenses within ten (10) days from the date hereof.

Any prior injunction herein shall be null and void upon the entry of and compliance with this order.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia

Sept. 28, 1983

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

SECOND AMENDED COMPLAINT

The United States of America, through its undersigned attorneys and by authority of the Attorney General, alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act, 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301(a) of the Clean Water Act, 33 U.S.C. 1311 and pursuant to Section 12 of the Rivers and Harbors Act, 33 U.S.C. 406, to obtain injunctive relief for defendant's failure to comply with Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C.

1319, and 33 U.S.C. 406. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times pertinent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed $10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B, and Ocean Breeze Mobile Home Sites Section C are waters of the United States.

10. Commencing on or after July 1975, and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs Eight and Nine above. Plaintiff further alleges that unless enjoined by this Court defendant will continue to discharge pollutants onto the wetlands described in Paragraph 8 above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311 (a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt, and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Fowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. At specific times best known to the defendant, but sometime commencing December 6, 1980 and continuing to the present time, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above. Plaintiff further alleges that unless enjoined by this Court, defendant will continue to discharge pollutants onto the wetlands described in Paragraph 21 above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM FOUR

25. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

26. On plaintiff's information and belief, defendant owns and/or controls additional wetlands, in the vicinity of the properties described in Paragraphs 8, 15, and 21 above, onto which defendant has discharged and/or caused to be discharged, or may in the future discharge and/or cause to be discharged pollutants, consisting of sand, dirt and other fill material onto such wetlands in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The location of these wetlands is well known to defendant.

CLAIM FIVE

27. Section 10 of the Rivers and Harbors Act of 1899 prohibits the creation of any obstruction to the navigable capacity of any waters of the United States except as authorized by the Secretary of the Army and recommended by the Chief of Engineers, 33 U.S.C. 403.

28. On plaintiff's information and belief, defendant filled the navigable water of the United States on the real property commonly known as Ocean Breeze Mobile Home Sites without the authorization of the Secretary of the Army and the recommendation of the Chief of Engineers.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from any and all further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, Three, and Four above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of $10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, Three, and Four above;

4. This Court enter an injunction requiring defendant to remove the obstruction unlawfully created in the navigable waters of the United States as described in Claim Five.

5. Plaintiff be awarded the costs and disbursements of this action; and

6. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

ELSIE MUNSELL
United States Attorney

JOHN F. KANE
Assistant United States
Attorney
Eastern District of Virginia
P. O. Box 60
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/s/ Diane L. Donley
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Of Counsel

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Environmental Protection Agency
Region III
Philadelphia, PA 19106

CERTIFICATE OF SERVICE

I hereby certify that the foregoing First Amended Complaint was hand-delivered, this 5th day of October, 1982, to the following persons:

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/s/ Diane L. Donley
DIANE L. DONLEY

APPENDIX F

AMENDMENT VII.
CONSTITUTION OF THE UNITED STATES

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

The Rivers and Harbors Act of 1899, 33 U.S.C. 401 et seq., provides in relevant part:

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same.

§ 406. Penalty for wrongful construction of bridges, piers, etc.; removal of structures

> Every person and every corporation that shall violate any of the provisions of sections nine, ten, and eleven of this Act [33 USCS §§ 401, 403, and 404], or any rule or regulation made by the Secretary of War [Secretary of the Army] in pursuance of the provisions of said section eleven [33 USCS § 404], shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any circuit court [district court] exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

The Clean Water Act of 1977, 33 U.S.C. 1251 et seq., provides in relevant part:

§ 33 U.S.C. 1311(a). Illegality of pollutant discharges except in compliance with law

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 33 U.S.C. 1319. Enforcement

(b) Civil actions. The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(d) Civil penalties. Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 U.S.C. § 1311, 1312, 1316, 1317, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator, or by a State or in a permit issued under section 404 of this Act [33 USCS § 1344] by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

§ 33 U.S.C. 1344(a). Discharge into navigable waters at specified disposal sites

> The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

§ 33 U.S.C. 1362. Definitions

Except as otherwise specifically provided, when used in this Act:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act [33 USCS § 1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

Regulations promulgated by the United States Army Corps of Engineers define Clean Water Act jurisdiction in relevant part as follows (33 C.F.R. 323.2(a)-(d)):

Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means: [1]

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters;

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section. Waste treatment systems, including treatment pond or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.-

11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands".

Regulations promulgated by the United States Army Corps of Engineers establishing the duties of the District Engineer upon learning of a violation or potential violation during the time period applicable to this case are:

§ 33 C.F.R. 209.120(f)(12)(i) (1975). Unauthorized activities

The following procedures will be followed with respect to activities which are performed without proper authorization.

(i) When the District Engineer becomes aware of any unauthorized activity which is still in progress,

he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. In appropriate cases, the District Engineer may also order interim protective measures to be taken in order to protect the public interest. If there is noncompliance with this cease and desist order, the District Engineer shall forward a factual report immediately to the local U.S. Attorney with a request that a temporary restraining order and/or preliminary injunction be obtained against the responsible persons.

§ 33 C.F.R. 326.2 (1977). Discovery of unauthorized activity in progress

When the District Engineer becomes aware of any unauthorized activity which is still in progress, he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. If appropriate, the District Engineer may also order interim protective measures to be taken in order to protect the public interest.

APPENDIX G

USC Section	Name	Civil Penalties	Date Enacted [1]
2 USC § 437g	Federal Elections Campaign Act	(a) (5) (B)-not to exceed $10,000.00 or 200% of any contribution	1/80/80
		(a) (6) (A)-not to exceed $5,000 or an amount equal to the contribution involved	1/8/80
2 USC § 702	Ethics in Government Act	(6) (C) (i)-not to exceed $5,000	10/26/78
2 USC § 706	Ethics in Government Act	$5,000 for each violation	10/26/78
5 USC § 202 (app)	Executive Personnel Financial Disclosure Requirement	(C) (i)-not to exceed $5000	10/26/78
		(C) (ii)-not to exceed $1000	10/26/78
5 USC § 204 (app)	Executive Personnel Financial Disclosure Requirement	not to exceed $5000	10/26/78
5 USC § 1207	Civil Service-Merit Systems Protection Board	(b)-not to exceed $1,000	10/31/78
7 USC § 9	Commodities Exchange Act	not to exceed $100,000 each violation	10/23/74
7 USC § 13a	Commodities Exchange Act	not to exceed $100,000 per violation	10/23/74
7 USC § 86	Grain Standards Act	(c)-not to exceed $75,000 per violation	10/21/76
7 USC § 136	Pesticide Control Act	(a) (1)-not to exceed $5,000 per offense	10/21/72

[1] The date enacted also includes the date amended to provide for civil penalties, when applicable.

82a

7 USC § 149	Agriculture-Insect Pest	(b) (1)-not to exceed $1,000	1/12/83
7 USC § 150gg	Federal Plant Pest Act	(b)-not to exceed $1,000	1/12/83
7 USC § 163	Agriculture-Nursery Stock	not to exceed $1,000	1/12/83
7 USC § 193	Packers & Stockyards Act	(b)-not to exceed $10,000 per violation	9/13/76
7 USC § 213	Packers & Stockyards Act	not to exceed $10,000 for each violation	9/13/76
12 USC § 1785	Banks & Banking-Federal Credit Unions	(e) (3)-not to exceed $100 for each day of violation	10/19/70
12 USC § 1828	Banks & Banking-FDIC	(h)-not more than $100 for each day of violation	5/13/60
12 USC § 1884	Banks & Banking-Bank Security Measures	$100 per day	7/7/68
12 USC § 1908	Banks & Banking-Credit Control	$1,000 for each violation	12/23/69
12 USC § 3417	Banks & Banking Right to Financial Privacy	(a) (1)-not to exceed $100.00	11/10/78
		(a) (2)-actual damages as court may allow	11/10/78
12 USC § 3909	Banks & Banking International Lending Supervision	(d) (1)-not more than $1,000 per day for each day violation continues	11/30/83
15 USC § 18a	Commerce & Trade-Monopolies; Restraints of Trade	(g) (1)-not more than $10,000 per day	9/30/76

83a

USC Section	Name	Civil Penalties	Date Enacted
15 USC § 21	Commerce & Trade-Monopolies; Restraints of Trade	(l)-not more than $5,000 for each violation	7/23/59
15 USC § 45	The Antitrusts Acts	(l)-not more than $5,000 for each violation	11/16/73
15 USC § 78u	Commerce & Trade-Securities Exchanges	(h) (7) (A)-(i) $100 w/o regard to volume of records (ii)-out of pocket damages	10/10/80
15 USC § 687g	Small Business Investment Act	(a)-not more than $100 for each day	8/21/58
15 USC § 719i	Alaska Natural Gas Transportation Act	(c)-not to exceed $25,000 per day	10/22/76
15 USC § 754	Emergency Petroleum Allocation Act	(3) (A) (i)-not more than $20,000 each violation	12/22/75
		(3) (A) (ii)-not more than $10,000 for each violation	12/22/75
		(3) (A) (iii) (I)-not more than $2,500.00	12/22/75
15 USC § 797	Energy Supply & Environmental Coordination Act	(b) (1)-not more than $2,500 for each violation	6/22/74
15 USC § 1398	National Traffic & Motor Vehicle Safety Act	(a)-$1,000 per violation not to exceed $800,000	9/9/66

15 USC § 1424	National Traffic & Motor Vehicle Safety Act	(b)-$1,000 per violation not to exceed $800,000	9/9/66
15 USC § 1917	Automobile Fuel Efficiency Act	(a)-not to exceed $1,000 per violation; or $800,00 per series of violations	10/20/72
15 USC § 1990b	Automobile Fuel Efficiency Act	(a)-not to exceed $1,000 per violation; or $100,000 per series of violations	10/20/72
15 USC § 2028	Automobile Fuel Efficiency Act	(a) (1) and (a) (4)-not to exceed $1,000 per violation; or $250,000 per series of violations	10/24/84
15 USC § 3414	Natural Gas Policy Act	(b) (6) (A) (ii)-not more than $250,000 per violation	11/9/78
15 USC § 4243	Sensing Commercialization Act	(a) (3)-not to exceed $10,000 per violation	7/17/84
16 USC § 470ff	Archaeological Resources Protection Act	(a) (2)-unlimited amount	10/31/79
16 USC § 972f	Eastern Pacific Tuna	(b) (3)-not to exceed $100,000 per violation	10/4/84
16 USC § 1100(a)	Conservation/Foreign Fishing Vessel In US Fisheries Act	(a)-not to exceed $1,000 per violation	10/27/72
16 USC § 1376	Marine Mammal Protection Act	(b)-not more than $25,000	10/21/72
18 USC § 1083	Crimes-Gambling (Transportation between ship & shore)	(b)-$200 for each passenger carried or transported	5/24/49

USC Section	Name	Civil Penalties	Date Enacted
19 USC § 1337	Tariff Act	(f) (2)-not more than $10,000 or the domestic value	7/26/79
19 USC § 1627a	Tariff Act	(b)-not more than $500 for each violation	10/30/84
21 USC § 134e	Food & Drugs-Animals, Meats & Dairy Products	(a) (2)-not more than $1,000	1/12/83
21 USC § 842	Food & Drugs-Drug Abuse Prevention	(c)-not more than $25,000	10/27/70
21 USC § 961	Food & Drugs-Drug Abuse Prevention	(1)-not more than $25,000	10/27/70
22 USC § 3105	International Investment Act	(a)-not to exceed $10,000	10/11/76
26 USC § 5761	Alcohol, Tobacco & Firearms-Cigars, Cigarettes, Papers	(a) not to exceed $1,000	9/2/58
26 USC § 6420	Procedure & Administration-Abatements, Credits & Refunds	(h) (1) and (2)-two times the excessive amount; or $10.00 each violation	1/14/83
26 USC § 6421	Procedure & Administration-Abatements, Credits & Refunds	(j) (2)-two times the excessive amount; or $10.00 each violation	1/14/83

26 USC § 6427	Procedure & Administration-Abatements, Credits & Refunds	(j) (1)-two times the excessive amount; or $10.00 each violation	10/17/76
26 USC § 6675	Procedure & Administration-Abatements, Credits & Refunds	(a)-two times the excessive amount; or $10.00 each violation	5/21/70
26 USC § 6677	Procedure & Administration-Abatements, Credits & Refunds	(a)-5% of trust; or maximum of $1,000.00	12/30/69
26 USC § 6679	Procedure & Administration-Abatements, Credits & Refunds	(a)-$1,000 each violation	9/3/82
26 USC § 6687	Procedure & Administration-Abatements, Credits & Refunds	(a)-$5.00 each violation	10/20/72
26 USC § 6689	Procedure & Administration-Abatements, Credits & Refunds	(a)-not to exceed 25% of deficiency	12/28/80
26 USC § 6697	Procedure & Administration-Abatements, Credits & Refunds	(a)-unlimited depending upon circumstances	10/4/76
26 USC § 6702	Procedure & Administration-Abatements, Credits & Refunds	(a) (1) (A)-$500.00 each violation	9/3/82

USC Section	Name	Civil Penalties	Date Enacted
28 USC § 1875	Protection of juror's employment	(b) (3)-not more than $1,000 for each violation	11/2/78
29 USC § 216	Fair Labor Standards	(e)-not to exceed $1000	4/8/74
29 USC § 666	Occupational Safety & Health	(a)-not to exceed $10,000 each violation	12/29/70
		(b)-not to exceed $1000 for each violation	12/29/70
		(c)-not to exceed $1000	12/29/70
		(d)-not to exceed $1000	12/29/70
		(i)-not to exceed $1000 for each violation	12/29/70
29 USC § 1059	Recordkeeping and Reporting Requirement	(b)-$10.00 each violation	9/2/74
30 USC § 942	Black Lung Benefits Act	(b)-not more than $500 for each failure	3/1/78
30 USC § 1719	Federal Oil & Gas Royalty Management Act	(a) (1) (2)-up to $500 each violation/ each day continues	1/12/83
		(b)-not more than $5000	1/12/83
		(c)-up to $10,000 per day	1/12/83
		(d)-up to $25,000 per violation for each day	1/12/83
31 USC § 3729	False Claims Act	$2,000.00, plus an amount 2 times damages & costs	9/13/82

31 USC § 5321	Money & Finance-Monetary Transactions	(a) (1)-$10,000 each	9/13/82
31 USC § 9308	Money & Finance-Sureties & Surety Bonds	at least $500.00 but not more than $5,000.00	9/13/82
33 USC § 499	Bridge Act of 1906	(c)-not more than $1,000	10/15/82
33 USC § 502	Bridge Act of 1906	(c)-not more than $1,000; each date separate violation	10/15/82
33 USC § 533	General Bridge Act of 1946	(b)-not more than $1,000; each day separate violation	10/15/82
33 USC § 930	Longshoremen's & Harbor Worker's Compensation Act	(e)-not to exceed $10,000 for each violation	3/4/27
33 USC § 1319	Federal Water Pollution Control Act or Clean Water Act	(d)-not to exceed $10,000 per day; each day separate violation	10/18/72
33 USC § 1321	Federal Water Pollution Control Act or Clean Water Act	(b) (6) (A)-not more than $5,000 for each violation	10/18/72
		(b) (6) (B)-not to exceed $50,000 except willful then penalty not to exceed $250,000; each violation separate offense	10/18/72
		(j) (2)-not more than $5,000	10/18/72
33 USC § 1322	Federal Water Pollution Control Act or Clean Water Act	(j)-not more than $2,000 per violation	10/18/72

USC Section	Name	Civil Penalties	Date Enacted
33 USC § 1344	Federal Water Pollution Control Act or Clean Water Act	(s) (5)-not to exceed $10,000 per day	10/18/72
33 USC § 1514	Deepwater Port Act	(b) (3)-not to exceed $25,000 per day	1/3/75
33 USC § 1517	Deepwater Port Act	(a) (2)-not more than $10,000 for each violation	1/3/75
33 USC § 1608	International Navigational Rules Act	(a)-not more than $5,000 for each violation	12/24/80
		(b)-not more than $5,000 for each violation	12/24/80
33 USC § 1908	Act to Prevent Pollution From Ships	(b) (1)-not more than $25,000 for each violation; each day separate violation	10/21/80
		(b) (2)-$5,000 for each offense	10/21/80
33 USC § 2072	Inland Navigational Rules Act	(a)-not more than $5,000 for each violation	12/24/80
		(b)-not more than $5,000 for each violation	12/24/80
39 USC § 3012	Postal Service Act	(a) (3)-not to exceed $10,000 per violation	11/30/83
42 USC § 300E-9	Public Health Services Act	not to exceed $10,000	12/29/73
42 USC § 300G-3	Safe Drinking Water Act	(b)-not to exceed $5,000 for each day of violation	12/16/74

42 USC § 300h-2	Safe Drinking Water Act	(b) (1)-not to exceed $5,000 for each day of violation	12/16/74
42 USC § 300h-3	Safe Drinking Water Act	(c)-not to exceed $5,000 for each day of violation	12/16/74
42 USC § 300J	Safe Drinking Water Act	(e) (2)-not more than $2,500 for each failure to comply	12/16/74
42 USC § 2114	Solid Waste Disposal Act	(b)-not to exceed $100,000 for each violation	1/4/83
42 USC § 2167	Atomic Energy Act	(a)-not to exceed $100,000 for each violation	6/30/80
42 USC § 2282	Atomic Energy Act	(a)-not to exceed $5,000 for each violation	12/24/69
42 USC § 4910	Noise Control Act	(a) (2)-not to exceed $10,000 per day per violation	10/27/72
42 USC § 5157	Disaster Relief Act	(b)-not to exceed $5,000 for each violation	5/22/74
42 USC § 5410	National Manufactured Housing Construction & Safety Standards Act	not to exceed $1,000 per violation or not to exceed $1,000,000 for any related series of violations	8/22/74
42 USC § 5846	Energy Reorganization Act	(b)-not to exceed $100,000 for each violation	10/11/74
42 USC § 6384	Energy Policy & Conservation Act	not to exceed $10,000 per violation	12/22/75
42 USC § 6395	Energy Policy & Conservation Act	not more than $5,000 per violation	12/22/75

USC Section	Name	Civil Penalties	Date Enacted
42 USC § 6928	Solid Waste Disposal Act	(a)-not to exceed $25,000 for each day of non-compliance	10/21/76
42 USC § 6934	Solid Waste Disposal Act	(e)-not to exceed $5,000 for each day of violation	10/21/80
42 USC § 6991	Solid Waste Disposal Act	(e) (a)-not to exceed $25,000 per day of non-compliance	11/8/84
		(e) (d)-not to exceed $10,000 per day per tank in violation	11/8/84
42 USC § 7218	Dept. of Energy Organization Act	(b)-not to exceed $10,000 per violation	8/4/77
42 USC § 7524	Air Pollution Control Act	not more than $10,000	8/7/77
42 USC § 7545	Air Pollution Control Act	(d)-not more than $10,000 per day of violation	12/31/70
42 USC § 7920	Uranium Mill Tailings Radiation Control Act	(a)-not more than $1,000 per day of violation	11/8/78
42 USC § 8220	National Energy Conservation Act	(d)-not to exceed $25,000 per violation	11/9/78
42 USC § 8513	Emergency Energy Conservation Act	(j) (1)-not to exceed $1,000 per violation	11/5/79
42 USC § 8512	Emergency Energy Conservation Act	(e) (1)-not to exceed $1,000 violation	11/5/79

42 USC § 8521	Emergency Energy Conservation Act	(f)-not to exceed $100.00 for each violation	11/5/79
42 USC § 9609	Comprehensive Environmental Response, Compensation & Liability Act	not to exceed $10,000 for each day of violation	12/11/80
43 USC § 1822	Outer Continental Shelf Lands Act	(a) (1)-not to exceed $10,000	9/18/78
45 USC § 39	Railroads-Safety Appliances & Equipment	not more than $100.00 for each day of violation	1/3/75
46 USC § 319	Shipping/Vessels in Domestic Commerce	$500.00 for each violation	12/24/80
46 USC § 420	Shipping/Inspection of Steam Vessels	(f)-not to exceed $1,000.00	9/10/76
46 USC § 815	Shipping Act	not to exceed $25,000	6/19/79
46 USC § 817 (e) (b) (6)	Shipping Act	not to exceed $1,000 for each day of violation	8/29/72
46 USC § 820	Shipping Act	(b)-not to exceed $5,000 for each day of violation	6/19/79
46 USC § 831	Shipping Act	(a)-not to exceed $5,000 for each violation	6/19/79
46 USC § 844	Intercoastal Shipping Act	not to exceed $1,000 for each day of violation	8/29/72
46 USC § 1122a	Merchant Marine Act	$50.00 per day for each day of violation	8/6/81

USC Section	Name	Civil Penalties	Date Enacted
46 USC § 1712	Shipping Act of 1984	(a)-not to exceed $50,000 for each violation	3/20/84
46 USC § 1714	Shipping Act of 1984	(b)-not to exceed $5,000 for each day of violation	3/20/84
46 USC § 2302	Shipping/Operation of Vessels	(a)-not more than $1,000 per violation	
		(b)-not more than $5,000 per violation	
		(c)-not more than $1,000 per violation	8/26/83
46 USC § 2306	Shipping/General	(a) (4)-not more than $5,000 per day of violation	
		(b) (2)-not more than $1,000 per day of violation	10/19/84
46 USC § 3102	Shipping-Inspection General	(c) (2)-not more than $25,000	10/30/84
46 USC § 3318	Marine Safety Act	(a)-not more than $5,000	8/26/83
		(g)-not more than $5,000	8/26/83
		(h)-not more than $1,000	8/26/83
		(i)-not more than $1,000	8/26/83
		(j) (1)-not more than $10,000 for each day in violation	8/26/83
		(k)-not more than $10,000 for each day in violation	8/26/83
		(l)-not more than $5,000 for each day in violation	8/26/83
46 USC § 3502	Shipping/Carriage of Passengers	(e)-not to exceed $100.00 for each violations	8/26/83
46 USC § 3504	Shipping/Carriage of Passengers	not more than $10,000 and $500.00 for each ticket sold	8/26/83
46 USC § 3506	Shipping/Carriage of Passengers	not to exceed $200.00	8/26/83
46 USC § 3718	Shipping/Dangerous Liquid Cargoes	(a) (1)-not to exceed $25,000 per day of violation	8/26/83
46 USC § 4106	Shipping/Uninspected Vessels	not to exceed $100.00	8/26/83
46 USC § 4311	Shipping/Recreational Vessels	(b)-not to exceed $100,000 for related series of violations	8/26/83
		(c)-not to exceed $1,000 per violation	8/26/83
46 USC § 4504	Shipping/Fish Processing Vessels	not to exceed $1,000 per violation	7/17/84
46 USC § 6103	Shipping/Casualty Investigations	not to exceed $1,000 per violation	8/26/83
46 USC § 8101	Shipping/General	(e)-$50.00 for each deficiency	8/26/83
		(f)-$100.00 for each deficiency	8/26/83
		(h)-not to exceed $1,000	8/26/83

USC Section	Name	Civil Penalties	Date Enacted
46 USC § 8102	Shipping/General	(a)-not to exceed $1,000	8/26/83
46 USC § 8103	Shipping/General	(f)-$500.00 per person employed in violation of Act	8/26/83
46 USC § 8104	Shipping/General	(i)-$100.00 each violation	8/26/83
		(j)-$500.00 each violation	8/26/83
46 USC § 8302	Shipping/Masters & Officers	(e)-$100.00 each violation	8/26/83
46 USC § 8304	Shipping/Pilots	(d)-$100.00 each violation	8/26/83
46 USC § 8502	Shipping/Pilots	(e)-$500.00 each violation	8/26/83
46 USC § 8503	Shipping Pilots	(d)-not more than $25,000 per violation	10/30/84
46 USC § 8701	Shipping/Unlicensed Personnel	(d)-$500.00 each violation	8/26/83
46 USC § 8702	Shipping/Unlicensed Personnel	(e)-$500.00 each violation	8/26/83
46 USC § 8906	Shipping/Tank Vessels	$1,000 each violation	8/26/83
46 USC § 9308	Shipping/Great Lakes	(a)-$500.00 for each day of violation	8/26/83
		(b)-$500.00 for each day of violation	8/26/83
		(c)-$500.00 each violation	8/26/83

96a

46 USC § 10307	Shipping/Foreign & Intercoastal	$100.00 each violation	8/26/83
46 USC § 10308	Shipping/Foreign & Intercoastal	$100.00 each violation	8/26/83
46 USC § 10309	Shipping/Foreign & Intercoastal	(b)-$200.00 for each report not made	8/26/83
46 USC § 10310	Shipping/Foreign & Intercoastal	$50.00 each violation	8/26/83
46 USC § 10312	Shipping/Foreign & Intercoastal	(c)-$100.00 each violation	8/26/83
46 USC § 10314	Shipping/Foreign & Intercoastal	(a) (2)-not to exceed $500.00	8/26/83
		(b)-not to exceed $500.00	8/26/83
46 USC § 10315	Shipping/Foreign & Intercoastal	(c)-not more than $500.00 per violation	8/26/83
46 USC § 10321	Shipping/Foreign & Intercoastal	$200.00 each seaman carried violation	8/26/83
46 USC § 10505	Shipping/Coastwise Voyages	(a) (2)-not to exceed $100.00	8/26/83
		(b)-not to exceed $500.00	8/26/83
46 USC § 10508	Shipping/Coastwise Voyages	$20.00 each violation	8/26/83
46 USC § 10711	Shipping/Unseaworthiness	3 times value of seaman's money, property & wages involved	8/26/83
46 USC § 10902	Shipping/Unseaworthiness	(a) (2)-$500.00 each violation	8/26/83
		(b) (4)-$100.00 each violation	8/26/83

97a

USC Section	Name	Civil Penalties	Date Enacted
46 USC § 10903	Shipping/Unseaworthiness	(d)-$100.00 each violation	8/26/83
46 USC § 10907	Shipping/Unseaworthiness	(b)-$500.00 each violation	8/26/83
46 USC § 11101	Shipping/Protection & Relief	(f)-no less than $50.00 but no more than $500.00	8/26/83
46 USC § 11102	Shipping/Protection & Relief	(b)-$500.00 each violation	8/26/83
46 USC § 11104	Shipping/Protection & Relief	(b)-$100.00 each violation	8/26/83
46 USC § 11105	Shipping/Protection & Relief	(C)-$500.00 each violation	8/26/83
46 USC § 11303	Shipping/Offenses & Penalties	(a)-$200.00 each violation	8/26/83
		(b)-$200.00 each violation	8/26/83
		(c)-$150.00 each violation	8/26/83
46 USC § 11505	Shipping/Offenses & Penalties	2 times the amount owed the Secretary	8/26/83
46 USC § 11506	Shipping/Offenses & Penalties	$50.00 each violation	8/26/83
46 USC § 12122	Shipping/Documentation	(a)-not more than $500.00 each violation	8/26/83
46 USC § 12309	Shipping/Recreational Boating Safety	(b)-not more than $1,000	8/26/83
		(c)-not more than $200.00	8/26/83
49 USC § 10527	Interstate Commerce-Jurisdiction	(b)-not more than $10,000 each violation	7/1/80
49 USC § 10529	Interstate Commerce-Jurisdiction	(d) (1)-$500 for each violation not more than $250 for each additional day	7/1/80
49 USC § 11901	Interstate Commerce Act	(a)-$5,000 each violation; each day a separate violation	10/17/78
		(b)-$500.00 each violation and $25.00 each day violation continues	10/17/78
		$25.00 each day continues	10/17/78
		(c)-$500 each violation	10/17/78
		(d)-not more than $5,000	10/17/78
		(e) (1)-at least $100.00 & not more than $500; $50.00 each day violation continues	10/17/78
		(e) (2)-$100.00 each violation	10/17/78
		(f) (1)-$500.00 each violation	10/17/78
		(f) (2)-$100.00 each violation	10/17/78
		(f) (3)-$100.00 each violation	10/17/78
		(g)-not more than $500.00 each violation and $250.00 each day violation continues	10/17/78
		(h)-not to exceed $20,000 each violation	10/17/78
		(i) (1)-$500 each violation; not more than $250 each day violation continues	10/17/78
		(j) (1)-not to exceed violation; not more than $500 each day violation continues	10/17/78

USC Section	Name	Civil Penalties	Date Enacted
		(j) (2) (b)-not more than $1,000; not more than $500 each day violation continues	10/17/78
		(j) (3)-not more than $500 each violation $250 each day violation continues	10/17/78
		(k)-$2,000 each violation; not more than $5,000 for each subsequent violation	10/17/78
49 USC § 11902	Interstate Commerce Act	3 times the value involved	10/17/78
49 USC § 11902a	Interstate Commerce Act	(a)-not more than $10,000 for each violation	7/1/80
		(b)-not more than $10,000	7/1/80
50 USC § 1705	Emergency Economic Powers Act	not to exceed $10,000 for each violation	12/28/77
50 USC § 2410 (app.)	Export Administration Act	(c) (1)-not to exceed $10,000 per violation	9/29/79